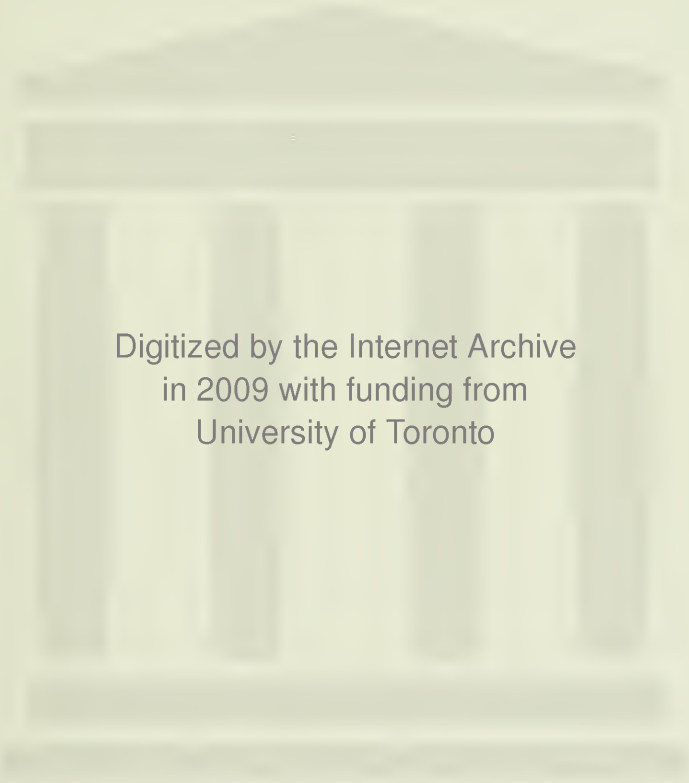




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THE

DOCTRINES AND PRINCIPLES

OF

THE LAW OF INJUNCTIONS.

BY

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OF LINCOLN'S INN, BARRISTER-AT-LAW;

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. . . βάθρον πολίων ἀσφαλές,
Δίκη.—Pind. OLYMPI. ιγ.

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TO
THE RIGHT HONOURABLE
HUGH MACCALMONT BARON CAIRNS,
LORD HIGH CHANCELLOR OF GREAT BRITAIN,
ETC. ETC. ETC.
AS A TRIBUTE OF ADMIRATION FOR HIS UNSULLIED INTEGRITY
AS A JUDGE,
PROFOUND KNOWLEDGE AS A LAWYER,
AND
EXALTED CHARACTER AS A STATESMAN AND LEGISLATOR,

This Work
IS, BY HIS LORDSHIP'S PERMISSION,
RESPECTFULLY DEDICATED
BY
THE AUTHOR.



P R E F A C E.

THE object of the Author in the present work is to set forth the doctrines and principles constituting the basis upon which Courts of Equity found their jurisdiction in administering the Law of Injunctions.

The subject is treated in an abstract form, and all reference to the circumstances of the cases where those doctrines and principles are enunciated are, so far as possible, avoided. No doctrine or principle is stated that is not founded on one or more cases, and these are always cited. It is believed that no doctrine or principle is omitted. So far as possible the doctrines and principles have been stated in the language of the Judges by whom they were pronounced.

In addition to the cases in the English Courts, including appeal cases in the House of Lords from the English, Irish, and Scotch Courts, and those in the Privy Council, cases decided in the American Courts have also been cited.

W. J.

Lincoln's Inn, July, 1877.



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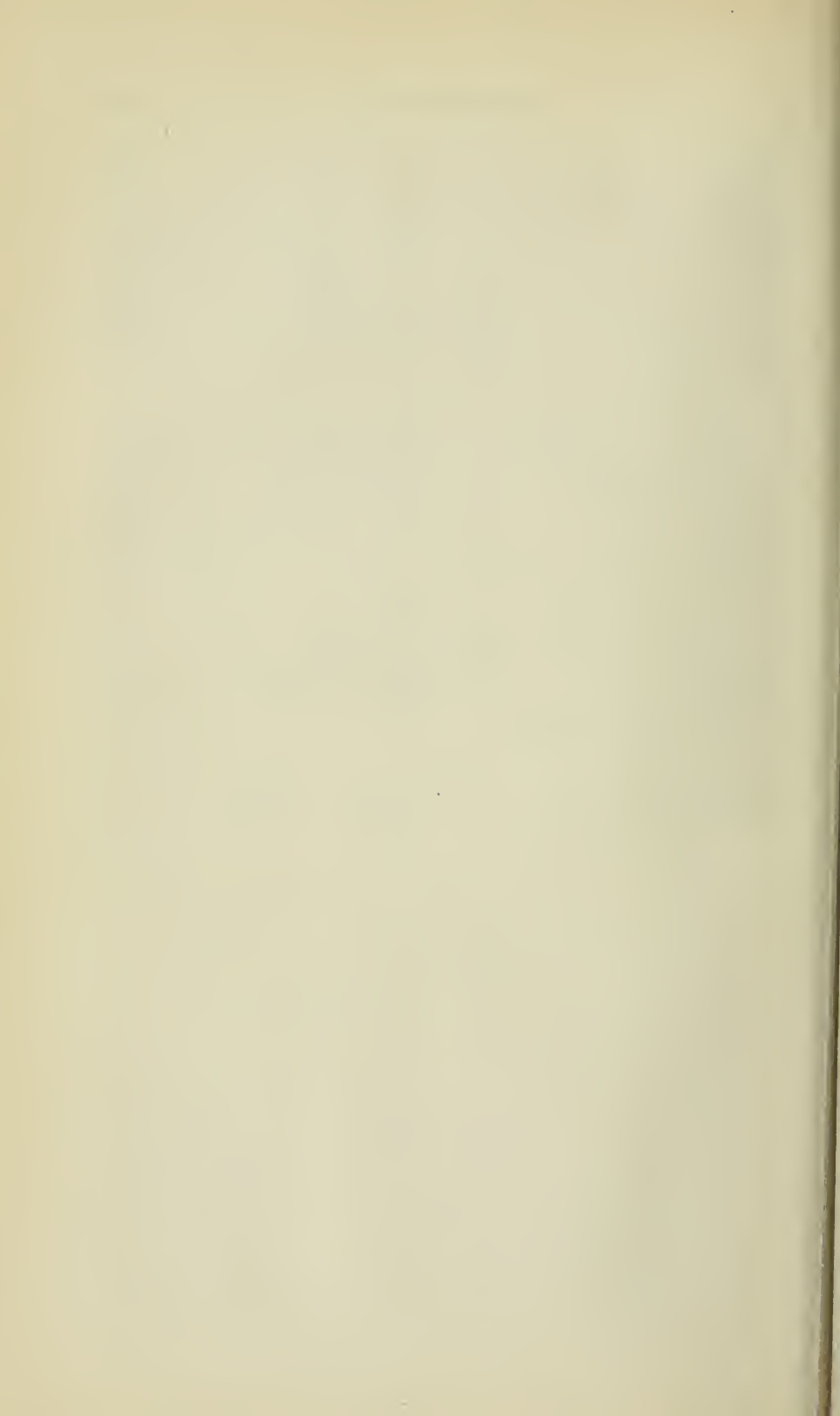
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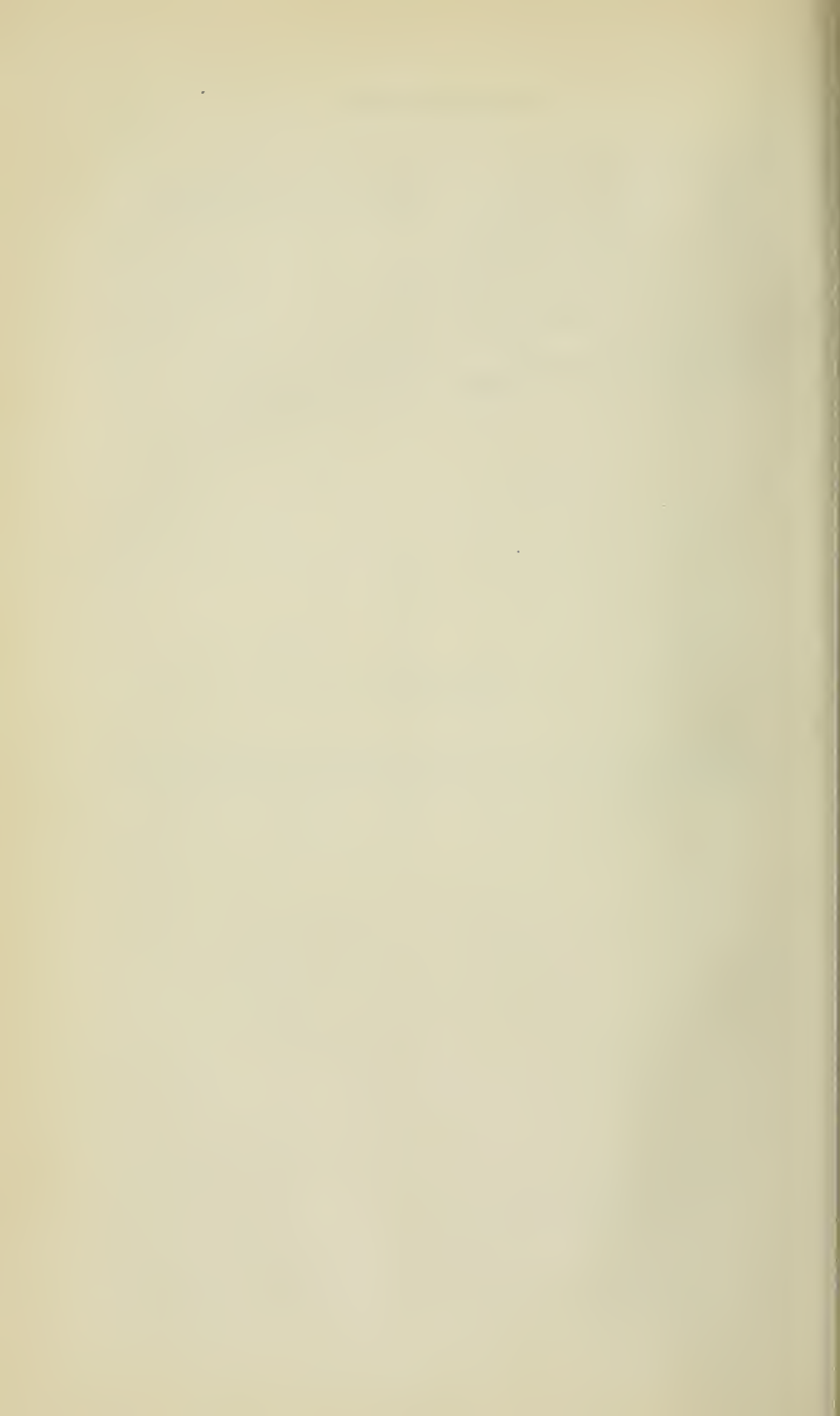
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_____ , s. 25 (6)	378, 416	_____ , Order 19,	
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_____ , c. 87 (<i>Endowed Schools Act, 1873</i>)	253	_____ 52,	
37 & 38 Vict. c. 87 (<i>Endowed Schools Act, 1874</i>)	253	rule 3	255
		(U. S.) Gen. Stats. c. 57, s. 7	350

ERRATUM.

Page 230, line 17 from top, for "a claim which," &c., to end of line, read "a claim of the principal debtor which has been allowed against the creditor."



THE
DOCTRINES AND PRINCIPLES
OF THE
LAW OF INJUNCTIONS.

INTRODUCTION.

Definition of an Injunction.

AN injunction is a writ remedial, issuing by the order of a Court of Equity, in those cases where the plaintiff is entitled to equitable relief, by restraining the commission or continuance of some act of the defendant (1).

Injunctions are usually divided into two classes, one, to stay wrongful acts of a special nature (not being proceedings in other Courts); the other, to stay proceedings in Courts of Law and other Courts. The first class of injunctions provides a remedy for the prevention of the commission, or for stopping, or for the abatement of any act that is contrary to the principles of Equity; this class of injunctions is obtained in a Court of Equity in those cases where there is no necessity for exercising the power such a Court possesses of restraining proceedings in Courts of Law and

(1) *Vide* Eden on Injunctions, pp. 1, 2. Under the provisions of "The Supreme Court of Judicature Act, 1873" (36 & 37 Vict. c. 66) and "The Supreme Court of Judicature Act (1873) Amendment Act, 1875," (38 & 39 Vict. c. 77, s. 9), the power of granting injunctions has been given to the "High Court of Justice"

created by that Act, and constituted of the then existing Court of Chancery, Courts of Common Law, Courts of Admiralty, Probate and Divorce and Matrimonial causes, in all cases where before the Act they could only have been granted by a Court of Equity.

other Courts (1). The second class of injunctions provides a remedy, by means of which, a party is prevented from taking advantage of the fact that he is entitled to institute or continue proceedings against another party in a Court, not being a Court of Equity; and enables a party who would not have a defence in such a Court, but nevertheless may be entitled to be relieved by a Court of Equity, to stay the proceedings in that Court, and to obtain a decision of a Court of Equity upon the question of his right to equitable relief (2).

(1) Eden, p. 2.

(2) *Vide* Eden on Injunctions, p. 3.

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CHAPTER I.

JURISDICTION.

SECT. 1. *Injunctions to restrain Acts of a Special Nature (not being Proceedings in other Courts).*

1. It would seem that a person on whom an injury is fraudulently committed may have a remedy in the Courts of any country where the fraud occurs, and even though he be at the time an alien enemy; thus a foreign manufacturer has a remedy by suit in this country for an injunction to restrain the fraudulent appropriation of his trade-mark, and for an account of profits, against a manufacturer in this country who has committed a fraud upon him, by using his trade-mark for the purpose of inducing the public to believe that the goods marked are manufactured by the foreigner; this relief is founded upon the personal injury caused to the foreigner by the defendant's fraud, and exists although he resides and carries on his business in another country, and has no establishment here, and does not even sell, or usually sell, the goods on which such trade-mark is affixed, in this country (1).

Foreigners.

2. The Courts of this country have no jurisdiction on a contract as against a foreign sovereign, and they have none as against other parties in favour of whom it is alleged the sovereign has committed an act in derogation of rights and privileges already granted to another party, nor have these Courts jurisdiction to interfere with

Foreign
Sovereign—
Foreign
Government.

(1) *Collins Company v. Brown, Same* 929; *et vide Collins v. Reeves*, 4 Jur. v. *Cohen*, 3 K. & J. 423; 3 Jur. (N. S.) 865.

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the sovereign acts of a foreign government, nor with the prerogative rights of the sovereign of another country; therefore, in the case of two inconsistent grants of the same subject-matter, by the same foreign sovereign authority, a Court of Equity in this country cannot aid parties claiming under the first grant against claimants, though within the jurisdiction, acting under the second (1). An English Court has no jurisdiction to enforce the contracts of a foreign government against the property of such government in England; and where the government of a state contracts a loan in another country, the contract is governed by the law of the state whose government contracts the loan, and not by the law of the country in which the contract is made (2). But if a foreign government by its agent make a contract in this country, and has lodged money in the hands of agents in this country, impressed with a plain and clear trust for payment of the sums to become due under the contract, the Court will not refuse relief to the contractor because the foreign government does not appear before the Court and submit to the jurisdiction (3). There is no doubt that the Court, having a trust fund under its control, may proceed to administer that fund, although a foreign government may be interested in it, and may not be before the Court, or subject to the jurisdiction of the Court (4). And a decree can be made against the agent of a foreign government restraining him from taking away securities deposited in this country on behalf of the public creditors of the foreign government, where that government has not appeared to the bill (5). The Court of Chancery has no jurisdiction to interfere merely with a view to prevent revolution, it is only to prevent an injury to property that its aid by injunction can be invoked. The actual reigning sovereign of a foreign state in amity with Great Britain is entitled to sue in this Court, and to obtain an injunction to prevent the issuing of monetary notes manufactured in England, purporting to be notes of that foreign

(1) *Gladstone v. Ottoman Bank*, 1 W. R. 480, 731; 41 L. J. (Ch.) H. & M. 505; 9 Jur. (N. S.) 246. 746.

(2) *Smith v. Weguelin*, L. R. 8 Eq. 198; 17 W. R. 904; 38 L. J. (Ch.) 465; 20 L. T. (N. S.) 724. (4) *Morgan v. Larivière*, L. R. 7 H. L. 423, 430; 44 L. J. (Ch.) 760.

(3) *Larivière v. Morgan*, 7 L. R. 550; 26 L. T. (N. S.) 859; 20 (5) *Foreign Bondholders (Corporation of) v. Pastor*, 23 W. R. 109; 31 L. T. (N. S.) 567.

state, but having no sanction from its government, if the Court is satisfied that some substantial injury will thereby accrue to the property of such foreign state and to that of the plaintiff's subjects whom he has a right to represent (1). This Court has jurisdiction by injunction to protect property from that which if completed would give a right of action, though it is not in every such case that an injunction may be demanded as of right, but if the party applying is free from blame, and promptly applies for relief and shews that by the threatened wrong, his property would be so injured that an action for damages would be no adequate redress, the injunction will be granted; and although an action arising purely *ex delicto* for an injury to property, may not have been brought by a foreign sovereign against an English subject in an English Court; on principle, there can be no doubt that such an action would be maintainable (2). A king who has re-established his authority after a revolution, the government of which may have seized upon his treasure and remitted part of it to persons in this country to purchase property, as for instance, steamships, is entitled to sue for those that may remain in the port of London (3). It is laid down as clear as any proposition can be, that the independent sovereign of a state is competent, in this country, to sue for his personal rights (4).

3. Although the Courts in this country cannot make an order against a foreign ambassador who does not submit himself to the jurisdiction, yet a Court of Equity has jurisdiction, in a suit by an English citizen against another English citizen in whose hand a fund is placed, subject to the sole control at law of a foreign ambassador or government, to restrain the defendant from parting with the fund upon the order of such foreign ambassador or government; and the existence of a contingent right in a foreign sovereign to a fund in the Bank of England, will not prevent such a Court from exercising jurisdiction to restrain the Bank from parting with the fund,

Foreign
ambassadors.

(1) *Emperor of Austria v. Day and Kossuth*, 3 De G. F. & J. 217; 9 W. R. 712, 563; 7 Jur. (N. S.) 639; 2 Giff. 628; 30 L. J. (Ch.) 690.

(2) *Emperor of Austria v. Day and Kossuth*, 3 De G. F. & J. 217; 7 Jur. (N. S.) 639; 30 L. J. (Ch.) 690.

(3) *King of the Two Sicilies v. Wilcox*, 1 Sim. (N. S.) 301, 332, 333; *et vide The Nabob of the Carnatic v. The East India Co.*, 1 Ves. Jun. 371; *The King of Spain v. Hullett*, 1 Bli. (N. S.) 31.

(4) *Ib.*

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British
subjects—
Foreigners.

until the determination of the question between the British subject and the foreign sovereign as to the right to the fund (1).

4. A Court of Equity has no power to restrain British subjects from doing in a foreign country, whatever they are authorized to do by the sovereign power there (2). And it must be a very strong case which would justify the Court in restraining a foreigner domiciled in another country, from proceeding to obtain payment of debts, according to the law of the country in which he is domiciled (3). So a Court of Equity will not restrain an administratrix to the estate of a person who was domiciled abroad (the administratrix having taken out letters of administration both in this and the foreign country), who is under a bond to the foreign Court properly to manage the property in England, from transmitting the English personalty to the foreign country; the English Court must take for granted that the foreign Court will do justice, as well as the Court here (4). If the property of a deceased person has been remitted by a personal representative, legally constituted by a Court of Her Majesty abroad, to this country, with request that the agent of the foreign administrator should place the proceeds of the same to the account of the estate, an English administrator of the deceased has a right to sue the foreign representative of the deceased in this country, in respect of those assets which are in this country, and to have the control of this Court exercised over them, until the rights are determined at the hearing and the Court will restrain the foreign administrator from receiving the proceeds of the property (5). If a party domiciled in one country has personal estate in another, though probate of his will in the latter country may be granted for the purpose of getting in his estate, yet such probate must be treated as ancillary to the law of the country of the domicile, and distribution of the estate ought to be directed accordingly (6).

5. One foreigner may file a bill to restrain other foreigners residing abroad from misapplying a fund, and for its administration

(1) *Gludstone v. Musurus Bey*, 9 Jur. (N. S.) 71; 32 L. J. (Ch.) 155; 11 W. R. 180. (4) *The Carron Co.*, 26 L. J. (Ch.) 332; *Stainton v. Carron Co.*, 21 Bea. 152.

(2) *Gladstone v. Ottoman Bank*, 9 Jur. (N. S.) 246. (5) *Hervey v. Fitzpatrick*, Kay, 42.

(3) *Maclaren v. Stainton*, *Maclaren* (6) *Thornton v. Curling*, 8 Sim. 31.

and if the foreigners will not appear, to submit to, or come within the jurisdiction, the possibility that there might be a failure of justice by their not submitting to the jurisdiction, can be dealt with by the Court. All that is necessary is for the plaintiff to shew that he has used all due diligence to bring the persons out of the jurisdiction, to contend with those who are within it, and that they will not come. The Court upon that default, and their so abstaining from giving the plaintiff the opportunity of obtaining relief, will, if they afterwards come here and bring an action, injoin that action for ever (1).

6. Equity may entertain a bill respecting land, though the land is not within its jurisdiction, where its decree can be enforced by acting on the person of a party (2). If a party can obtain the relief he is entitled to in respect of land out of the jurisdiction, against parties within the jurisdiction, who are already before a Court within the jurisdiction competent to give the relief, a Court of Equity will not, on principle and authority, permit these parties to be troubled by an action out of the jurisdiction (3).

7. There is no doubt that when persons who are resident here enter into a contract, though the subject-matter of the contract is abroad, yet the contract may be sustained; but when neither party has anything to do with this country, and the subject-matter is not situate here, the Court will not interfere (4).

8. There must be some special circumstances in order to justify the interference of the Court, such as the fact of one of the parties being resident or the property situate in this country; otherwise there must be an absolute necessity for interfering (5).

9. According to the established law of nations, if a suit in this country is for damages only, or one which could result in damages only, the plaintiff must, in order to enforce his claim for damages, go and seek the forum of the defendant. But where the contract, though made abroad, is to deliver a thing *in specie* to a person in this country, and the thing itself is brought here, then the Court

(1) *Central Railroad and Banking Company v. Mitchell*, 2 H. & M. 452;
Stevenson v. Anderson, 2 V. & B. 407.

(2) *Eros v. Hunter*, 4 Giln. 211 (Amr.).

(3) *Eustace v. Lloyd*, 25 W. R. 211.

(4) *Blake v. Blake*, 18 W. R. 944.

(5) *Matthaci v. Galitzin*, 22 W. R. 700; L. R. 18 Eq. 340; 43 L. J. (Ch.) 536; 30 L. T. (N. S.) 445.

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here, in the exercise of its discretion, will see that the thing to be delivered in this country, does not leave this country so as to defeat the right of the plaintiff to have it so delivered (1).

Judgments of
foreign Courts.

10. If the proceedings in a foreign Court do not amount to a judgment *in rem*, but *in personam* only, and a party has not been concluded by having intervened to defend his rights in a suit, and his conduct has not amounted to a selection of a foreign jurisdiction, the judgment of the foreign Court is examinable by the Courts of England (2). And if there is a plain and manifest error on the face of the judgment, an English Court will not be bound to recognise it (3).

11. If it is found impracticable to execute a decree in England, the Court of Chancery in Ireland has jurisdiction to carry the English decree into execution. The propriety of the English decree may be examined in the suit in Ireland, and if part of it is sustainable, it may, so far, be executed by the aid of the Irish Court, although the other parts may be erroneous (4).

12. If there be an infirmity in a particular jurisdiction in England, through which it has no power to decide a question arising from matters connected with its particular jurisdiction, the Court of Chancery will exercise its universal jurisdiction where the question is one that comes within that jurisdiction (5). So the Court will aid a public body acting duly within its authority, by an injunction restraining the commission of the act prohibited by that public body (6).

(1) *Hart v. Herwig*, L. R. 8 Ch. 860, 863; 42 L. J. (Ch.) 457; 21 W. R. 663, 538; 28 L. J. (N.S.) 329; 29 L. J. (N.S.) 47.

(2) *Simpson v. Fogo*, 1 J. & H. 18; 1 H. & M. 195; 6 Jur. (N.S.) 949; 29 L. J. (Ch.) 657.

(3) *Ib.*

(4) *Houlditch v. Donegal*, 8 Bli. (N. S.) 301; 2 Cl. & F. 470.

(5) *Troup v. Ricardo*, 4 De G. J. & S. 489, 495; 34 L. J. (Ch.) 91.

(6) *Att.-Gen. v. Great Western Railw. Co. and Midland Railw. Co.* 24 W. R. 1015.

Universal
jurisdiction of
Chancery in
aid of parti-
cular jurisdic-
tions in
England.

SECT. 2. *Injunctions to restrain Proceedings in Courts of Law and other Courts.*

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1. Wherever a party by fraud, accident, or otherwise, has an advantage in proceeding in a Court of ordinary jurisdiction, which must necessarily make that Court an instrument of injustice, and it is therefore against conscience that he should use the advantage; in such case, to prevent a manifest wrong, Courts of Equity interpose, by restraining the party whose conscience is thus bound from using the advantage he has improperly gained; and upon these principles, bills and other applications to restrain proceedings in Courts of ordinary jurisdiction are of frequent occurrence (1). An injunction, where its object is to restrain proceedings in another Court, is directed only to the parties; it neither assumes any superiority over the Court in which they are proceeding, nor denies its jurisdiction, but is granted on the sole ground, that from certain equitable circumstances, of which the Court that issues it has cognisance, it is against conscience for the party to proceed in the cause (2). The injunction, when awarded, does not deny, but admits the jurisdiction of the Court of Common Law, and the ground on which it issues is, that it is making use of its jurisdiction contrary to equity and conscience (3).

2. The authority of a Court of Equity, upon a proper case being made, to restrain persons within its jurisdiction from prosecuting suits either in Courts within its jurisdiction, or of foreign countries, is clear and indisputable. In the exercise of this power, Courts of Equity proceed, not upon any claim of right to interfere with, or to control the course of proceedings in other tribunals, but the jurisdiction is founded on the clear authority vested in Courts of Equity over persons within the limits of their jurisdiction and amenable to process, to restrain them from doing acts which will work wrong and injury to others. As the decree of the Court in such cases is pointed solely at the party, and does not extend to the tribunal where the suit or proceeding is pending, it is wholly immaterial that the party is prosecuting his action in

(1) *Vide* Mitf. Pl. 150, 5th ed.

(2) Eden, Inj. 4; *Burpee v. Smith*, Walker, Ch. 327 (Amr.).

(3) *Hill v. Turner*, 1 Atk. 515, 516.

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the Courts of a foreign state or country (1). The great purpose of a Court of Equity, in assuming jurisdiction to restrain from proceedings at Law, is to afford a more plain, adequate and complete remedy for the wrong complained of, than the party can have at Law (2).

3. The Court of Chancery has jurisdiction to stay the proceedings of parties in a foreign Court (3). If the circumstances of a case are such as would make it the duty of a Court of Equity in this country, to restrain a party from instituting proceedings in another Court here, they will also warrant it in imposing on him a similar restraint, with regard to proceedings in a foreign Court (4). If an order has been made in a suit in England, which in effect decided that the Court of Chancery here is the proper tribunal to decide a question, that Court will restrain a party to the suit in England from prosecuting an action against the other party out of England—for instance in Scotland—raising the same question (5). If a Court of Equity is of opinion that there has been acquiescence, it will restrain a party from proceeding in a foreign country to compel an account (6).

4. The fact of a foreigner having property in this country, enables a Court of Equity here, to make effectual an injunction issued to him. But in the case of a foreigner who seeks no assistance from here, the issuing of such injunction ought clearly to be shewn to be required as conducive to justice (7).

5. When there is a plain equity in favour of an injunction, and the representatives of the real and personal property, who seek it, are in this country, the Court will grant it, and restrain proceedings in the Court of a foreign country, and in such a case the Court will decide, upon a consideration of all the circumstances, and require parties here, to take, or direct such steps in a foreign Court, as the ends of justice require; but the particular

(1) *Dehon v. Foster*, 4 Allen, 545, 550; 7 Ib. 57; *vide Bank, &c. v. Rutland*, 2 Wins. 470 (Amr.).

(2) *Glenn v. Fowler*, 8 Gill. & J. 340 (Amr.).

(3) *Lord Portarlington v. Soulby*, 3 My. & K. 104.

(4) *Carron Iron Co. v. Maclaren*, 5 H. L. C. 416.

(5) *Oakeley v. Ramsey*, 27 L. T

(N. S.) 745.

(6) *Cood v. Cood*, 33 Beav. 314; 9 Jur. (N. S.) 1335; 32 L. J. (Ch.) 273; *et vide Norris v. Chambres*, 3 De G. F. & J. 583; 7 Jur. (N. S.) 59, 689; *Ex-Rajah of Coorg v. East India Company*, 29 Beav. 300.

(7) *Carron Iron Co. v. Maclaren*, 5 H. L. C. 416.

provisions of the foreign law applicable to a transaction, proceedings as to which in a foreign Court are thus restrained, must not be disregarded (1). If there is conflicting evidence, as to whether accounts can be conveniently taken in this country or in Scotland, the Court will not restrain proceedings in a suit in Scotland for the same purpose (2); nor will the Court exercise its jurisdiction, to restrain proceedings in the Court of Session in Scotland, if the circumstances of the case render its interference unadvisable; as where the question between the parties might, upon the whole, be more conveniently litigated, and with a more conclusive result, there, than here (3). The Court of Chancery in England has no power to restrain an Irish creditor from proceeding to recover his claim against the estate of an intestate deceased debtor, domiciled and leaving property in Ireland; an Irish creditor cannot be compelled to prove his claim in England and to forego his rights to recover in Ireland, he being in no privity with the English suit (4). A Court of Equity in England will not interfere with the action of an American Court, to restrain the negotiation of bills of exchange, which have come into the possession of a party in England, by virtue of a commission issuing out of the American Court, for the purpose of taking evidence upon proceedings there upon the bills; upon an allegation that the bills came into the possession of the party bringing the action in America, and the party in England, an agent of the plaintiff, by a breach of duty. The exercise of such a jurisdiction would be interfering with the action of the American Court, and a violation of the principles of the administration of justice; the complaint, if any, should be asserted in the American Court (5). A Court of Equity in England will aid the proceedings in a foreign Court competent to decide the questions, by restraining an action at law here, to recover moneys which are part of the subject-matter in dispute, in the foreign Court, between the parties (6).

6. The Court of Chancery will interpose by injunction, to restrain

(1) *Carron Iron Co. v. Maclaren*,
5 H. L. C. 416.

(2) *Maclaren v. Stainton, Maclaren or
Stainton v. Carron Co.*, 2 Jur. (N.S.) 49.

(3) *Jones v. Geddes*, 1 Ph. 724;
14 Sim. 606.

(4) *Browne v. Roberts*, 19 W. R. 155.

(5) *London and Mediterranean
Bank (Limited) v. Strutton*, 18 W. R.
107; 21 L. T. (N. S.) 415.

(6) *Transatlantic Co. v. Pietroni*,
Joh. 604.

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a plaintiff from prosecuting two distinct suits, in different Courts, for the same object, either in this or a foreign country; but a plaintiff may carry on proceedings in one Court, to establish a demand, and in another Court, to obtain security, which the former Court is unable to give him, for what shall be found due to him (1). If the subject-matter of a suit in Ireland, not brought to a hearing, is the same as that of a suit instituted in the Court of Chancery in England, in which that Court has pronounced a decree refusing the relief sought by the plaintiff, this Court will restrain the plaintiff from prosecuting the suit in Ireland (2). If the proceedings in a foreign Court will enable this Court more satisfactorily to dispose of the question between the parties, this Court will permit such proceedings to go on to an adjudication, but it will not give such permission, where the adjudication of the foreign Court between the parties there, whatever it may be, will preclude the question which the plaintiffs in this Court may think proper to raise against the plaintiffs in the proceedings in the foreign Court; and where the title of a party does not turn on the law of a foreign country in the first instance, though it may ultimately; but on a preliminary question (which this Court is not only as competent as the foreign Court to decide upon, and, according to the position of the parties, much more competent, in a case where this Court has all the parties before it) this Court will not allow the proceedings in the foreign Court to go on, involving the same question, with the chance of the two Courts arriving at opposite conclusions (3).

7. A suit between a plaintiff residing in England against defendants also residing here, to enforce a lien on immovable property of the defendants, situate out of the jurisdiction of the Court of Chancery in England, requires that some special state of circumstances should exist in order to enable the Court to give any relief of this description (4).

8. The Court of Session in Scotland has no power to alter, vary

(1) *Wedderburn v. Wedderburn*, 2 318; 8 L. J. (N. S.) Ch. 297; 3 Jur. Beav. 208; 4 My. & Cr. 585. 644; *vide Beckford v. Kemble*, 1 S. & S.

(2) *Booth v. Leicester*, 1 Keen, 579; 7; 1 L. J. (Ch.) 5.

3 My. & Cr. 459.

(4) *Norris v. Chambres*, 29 Beav.

(3) *Bunbury v. Bunbury*, 1 Beav. 246.

or discharge any order of the Court of Chancery, made under the jurisdiction of the Great Seal, which is as much the Great Seal of Scotland as of England (1).

9. If the Court of Chancery in England has appointed a guardian, and settled a scheme for the education of an infant peer who is entitled to estates in England and Scotland, it will restrain the tutor dative from continuing proceedings in the Court of Session in Scotland, relative to the education, residence, and English estates of the infant, so as to supersede the scheme of the Court of Chancery (2).

10. Although the fact of an administration decree having been obtained in a Court of Chancery of limited jurisdiction is not a ground for staying proceedings in a Court of general jurisdiction for the administration of the same estate, where a portion of the estate is situate beyond the jurisdiction of the inferior Court, yet the superior Court will, if it be advisable, stay the proceedings in the suit in the superior Court (3).

11. If evidence of the transactions in respect of which proceedings have been taken in Scotland by defendants against a plaintiff—he having property there, and being also a domiciled Scotchman in England,—cannot by the law of Scotland be received there, there is ground for supposing that complete justice cannot be done there; in that case a Court of Equity in England will restrain proceeding with the action in Scotland (4). But if a question, on the whole, is likely to be more conveniently litigated and concluded in Scotland than here—notwithstanding there may be a suggestion of fraud, and the remedy in cases of fraud may be more effectual here than in Scotland—a Court of Equity in England will not restrain the prosecution of a suit in Scotland (5). Still, if it appears to a Court of Equity here, that there are questions between the parties which can be more conveniently determined in this country, the Court will restrain proceedings in a

(1) *Bute (Marquis) v. Stuart*, 2 Giff. 582; 4 Macq. H. L. C. 1.

(2) *Bute (Marquis) v. Stuart*, 2 Giff. 582, affirmed on appeal *sub. nom. Stuart v. Moore*, 4 Macq. H. L. C. 1.

(3) *Wynne v. Hughes*, 5 Jur. (N. S.) 165; 28 L. J. (Ch.) 283; 32 L. T. 326.

(4) *Ainslie v. Sims*, 23 L. J. (Ch.) 161.

(5) *Jones v. Geddes*, 1 Ph. 724; 14 Sim. 606.

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foreign country (1). If Courts of Scotland have power to preserve property *pendente lite* instituted there, a Court of Equity here, has no jurisdiction to that end (2). Although the Court of Chancery has undoubted jurisdiction to restrain persons from prosecuting proceedings in the Court of Session in Scotland, yet that will not authorize the Court in doing so, if the Court of Session has a competent jurisdiction (3). But whether property is to be administered according to English or Scottish notions of Equity (which in many material points differ) must depend, when a cause is heard, on the national character of the individuals, and the character of the property which the decree affects (4). As to real estate in a foreign country, the Court of Chancery in England will not interfere; but if proceedings there relate to personalty as well as realty, they ought to be restrained altogether, if it cannot be shewn that the proceedings there, can be carried on, as to the landed estate, without proceeding as to the personal estate (5).

12. If the matters in question may properly be the subject of adjudication in a suit in a colony, the Court of Chancery will not, on the ground of error or irregularity in the decree of the colonial Court, interfere by injunction to restrain proceedings in the Colony, inasmuch as the Privy Council is the Court of Appeal from the Colonial Court, and has jurisdiction to stay the execution of the decree pending the appeal (6). Though there is jurisdiction in the Court of Chancery upon a contract concerning an estate of the colony, yet where the question, upon the construction of a contract for a security, by way of mortgage, has been before a Court of competent jurisdiction in the colony, and a foreclosure and sale directed, and there are merely general allegations of fraud, which are denied, these circumstances preclude the Court from exercising any jurisdiction (7).

13. When the Courts of one country are called upon to enforce.

(1) *Bunbury v. Bunbury*, 1 Beav. 318; 8 L. J. (N. S.) Ch. 297; 3 Jur. 644.

(2) *Cruikshank v. Robarts*, 6 Madd. 104.

(3) *Kennedy v. Cassilis (Earl of)* 2 Sw. 313, 321, 326.

(4) *Ib.*

(5) *Hope v. Carnegie*, L. R. 1 Ch. 320; 14 W. R. 260.

(6) *Henderson v. Henderson*, 3 Hare, 100.

(7) *White v. Hall*, 12 Ves. 321.

contracts entered into in another country, the question to be considered is not merely whether the contract sought to be enforced is valid according to the laws of the country in which it was entered into, but whether it is consistent with the laws and policy of the country in which it is sought to be enforced; for if any part of the contract be inconsistent with the law and policy of the latter country, the contract will not be enforced, even as to another part of it which may not be open to this objection, and may be the only part remaining to be performed (1).

14. A Court of Equity will grant a perpetual injunction to stay proceedings at Law in England, against a foreigner, for the seizure of estates of English subjects in the foreign land as confiscate, for an act done in violation of letters patent granted to the foreigner, by the king of the foreign country, where the seizure has been sanctioned by the judgments of the Courts of the foreign nation, and an execution has been had in pursuance thereof; after all this, to send the case to a trial at Law, or submit it to a common jury, would be monstrous and absurd (2).

15. Although the Court may not be prepared to say how far it will finally give redress, yet it will grant an injunction against proceedings at Law on securities, if they have been obtained by duress by one resident foreigner against another, under an obligation entered into in a foreign country as surety, which, according to the law of that country, could not affect the person (3).

16. If a Court of Equity has concurrent jurisdiction with a Court of Law, and has assumed such jurisdiction by interfering to protect the rights of the parties, it will restrain parties to the contract from bringing actions at Law, founded on the facts with regard to which the Court has interfered, and in which actions, the same question of the legal effect of the agreement, and in the circumstances, would necessarily arise (4). Such a Court will restrain by injunction the proceeding in an action, in cases where the rights of the parties thereto, in reference to the subject-matter of the

Courts of Law.

(1) *Hope v. Hope*, 8 De G. M. & G. 731; 22 Beav. 351.

(3) *Talleyrand v. Boulanger*, 3 Ves. 447.

(2) *Blad v. Bamfield*, 3 Sw. 604.

(4) *Brenan v. Preston*, 10 Hare, 331.

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action, are being determined in a suit in Chancery (1), or have been determined there (2). So it will interpose by injunction, although the Court of Law might, from the form of action, advert to the equities of the parties (3). Still, in cases of concurrent jurisdiction, although proceedings may have been first instituted in a Court of Equity, the Court of Equity will not, on an interlocutory application, grant an injunction to restrain an action at Law, commenced immediately after the filing of the bill, where the defendant desires to try the question at Law, and the balance of convenience is in favour of a trial at Law (4). And where proceedings at Law have been taken shortly before filing a bill in respect of the same matter, although the Court of Chancery may have complete jurisdiction in the case, yet if a Court of Law be the more proper tribunal for dealing with the case, the action will not be restrained (5). In cases of concurrent jurisdiction, the Courts of Chancery ought not to interfere with proceedings at Law, unless it has better means of doing justice between the parties than are possessed by a Court of Law. That may be the case, either because a Court of Equity is able to give a more perfect remedy, or because the nature of the case admits of its being better tried by the procedure of such a Court than by a Court of Law (6). But if there be an equitable case stated by a bill, there is jurisdiction in Equity to interfere by way of injunction to restrain proceedings at Law if necessary, even assuming the jurisdiction to be not exclusively in Equity (7).

17. If relief, which is the proper subject of the jurisdiction of another Court, be dependent upon relief to be given in a Court of Equity, or if the relief, which is properly a subject for this Court,

(1) *Laing v. Zeden*, 19 W. R. 273; 23 L. T. (N. S.) 587; 40 L. J. (Ch.) 155; *vide Roberts v. Maddocks*, 13 Sim. 549.

(2) *Flight v. Chambre*, 14 Jur. 123.

(3) *Meux v. Smith*, 1 M. D. & De G. 396; 2 M. D. & De G. 315, 789; 11 Sim. 410.

(4) *Hoare v. Brembridge*, L. R. 8 Ch. 22; 21 W. R. 43; L. R. 14 Eq. 522; 27 L. T. (N. S.) 368, 593; 42 L. J. (Ch.) 1.

(5) *Clarke v. Chapple*, 29 L. T. (N. S.) 204.

(6) *Ochsenbein v. Papelier*, L. R. 8 Ch. 695; 42 L. J. (Ch.) 861; 21 W. R. 516; 28 L. T. (N. S.) 459; *et vide Anderson v. Lamb*, 21 W. R. 764; *Kemp v. Tucker*, L. R. 8 Ch. 369; 42 L. J. (Ch.) 532; 21 W. R. 470; 23 L. T. (N. S.) 458.

(7) *Traill v. Baring*, 4 De G. J. & S. 318.

cannot be given, except that which belongs to another jurisdiction be also given, the Court, to prevent multiplicity of suits, may give both kinds of relief; but if the relief which is sought in a suit be of different kinds, within the jurisdiction of different Courts, and independent of each other, although relating to the same transaction, the right in this Court to one kind of relief will not necessarily draw along with it the right to the other (1).

18. The Courts of this country will apply the general law of this country—being founded on abstract principles of justice, and not upon any peculiarities of system—to the questions relating to lands in a colony, for instance, between a mortgagor and mortgagee of lands in a colony, unless it is suggested that there is a peculiarity in that respect, in the law of the colony, and will restrain a party from enforcing the payment of a security, unless he will indemnify the defendant at Law from any consequences that may arise to the defendant at Law from the consequences of the omission of an act by the plaintiff at Law in its nature merely formal, but necessary in the colony for the protection of the defendant at Law (2).

19. A Court of Equity will not refuse to interfere when the remedy is more complete and perfect in Equity than it is at Law (3). But if a matter is within the exclusive jurisdiction of the Courts of Common Law, a Court of Equity will not interfere (4). Thus, if fraud can be pleaded in an action, a Court of Law is the proper tribunal, a jury being able to appreciate the value of the evidence (5). Where a Court of Common Law has clearly jurisdiction, a Court of Equity will not restrain an action commenced before the institution of the suit; a Court of Equity only interferes where there are equitable circumstances which render it unjust, as against the defendant at Law, that the action should go on (6). But such a Court has no jurisdiction to do so, on the ground that a Court of Law is miscarrying, or that an Act of

(1) *Castelli v. Cook*, 7 Hare, 89.

(2) *Bentinck v. Willink*, 2 Hare, 1, 8.

(3) *Duncombe v. Greenacre*, 8 W. R.

657; 6 Jur. (N. S.) 987.

(4) *Elborough v. Ayres*, 18 W. R.

913; 39 L. J. (Ch.) 601; 23 L. T.

(N. S.) 68.

(5) *Fennelly v. Ranscellot*, 19 W. R.

966.

(6) *Portsmouth (Earl of) v. Part-
ridge*, 8 W. R. 658; *et vide Worms*

(*Baron de*) *v. Mellier*, L. R. 16 Eq.

554.

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Parliament is absurd (1). A Court of Equity will not decide upon, or interfere with, an order of a Common Law Court, if the questions are such as ought to be decided by such a Court, and arise out of the peculiar procedure and practice of such Courts; although no doubt that ought to be done by a Court of Equity, if injustice were wrought by not deciding (2). Such a Court has no jurisdiction to restrain the enforcing of a judgment, on the ground that the action was brought under circumstances amounting to the Common Law offence of maintenance (3). It is not of itself a sufficient ground to obtain an injunction in the Court of Chancery, to restrain proceedings on a matter in the King's Bench in England, that an injunction has been granted, on an interlocutory application in the Court of Chancery in Ireland, to restrain proceedings at Law there; but a final judgment may be different (4). The Court, under special circumstances, will, on the application of one defendant, restrain a co-defendant from proceeding with an action (5). So on a motion of the plaintiff, it will restrain an action by one defendant against a co-defendant (6).

20. Equity will restrain by injunction, not only the suit at Law itself, but also the introduction of evidence in such suit, which, though perhaps legally admissible, is manifestly contrary to right and justice (7). Equity will sometimes aid, as well as restrain a suit at Law, by injunction. Thus an injunction will be granted to restrain the assignor of an equitable claim from dismissing a suit for such claim, brought in his name, by the assignee (8). So, in a case of necessity, a Court of Equity will interfere to prevent a defendant from affecting property in litigation, by contracts, conveyances, or other acts, or order security therefor (9).

21. Although the writ of *audita querelâ* is said to be in the nature

(1) *Portsmouth (Earl of) v. Portridge*, 8 W. R. 658; *et vide Worms (Baron de) v. Mellier*, L. R. 16 Eq. 554.

(2) *Le Clerc v. Greene*, 22 W. R. 428, 430.

(3) *Elborough v. Ayres*, 18 W. R. 913; 39 L. J. (Ch.) 601; 23 L. T. (N.S.) 68.

(4) *Ball v. Storie*, S. & S. 210.

(5) *Edgcombe v. Carpenter*, 1 Beav. 171.

(6) *Kingham v. Maisey*, 2 Sim. 41.

(7) *Wells v. Bridgeport, &c.*, 43 Conn. 316 (Amr.)

(8) *Deaver v. Eller*, 7 Ired. Eq. 24 (Amr.); *et vide People of Kent v. Kent*, 6 Cal. 89.

(9) *Miller v. Washburn*, 3 Ired. (Ch.) 161 (Amr.); *Cottrell v. Moody*, 12 B. Morr. 500 (Amr.).

of a bill in Equity to be relieved against the oppression of the plaintiff (1), yet the defendant at Law is not, either by the existence of that remedy, or by having unsuccessfully resorted to it, precluded from bringing his original bill in Equity for relief against the plaintiff, in a case where the Court of Law has set aside the writ in a summary proceeding; but it is a matter of doubt whether the fact that a writ of *audita querelâ* has been obtained, and is in force, will preclude a bill in Equity by the same defendant on the same ground (2).

22. If the question is concluded by a judgment of the House of Lords, the Courts below will refuse an injunction in a similar case (3). When a Court of Equity withholds granting relief until a right is established at Law, it is bound by the decision at Law, except upon the point of damages awarded by the jury, as to the amount of which, in such a case, the Court is not bound, and will, if it thinks proper, direct an inquiry to be made as to the damage sustained. But there are two classes of cases in which the Court will give a decree not in accordance with a verdict: one, in which the trial has taken place before itself, and it has full cognisance of the matter; the other, in which it has directed an issue to be tried, the object of which is merely to inform the conscience of the Court (4). If, whilst suits are depending in the Court of Chancery, the plaintiffs indict the defendant's agent at the sessions, where they themselves are judges, for a breach of the peace, an order will be made to restrain the plaintiffs from proceeding at the sessions till the hearing of the cause and further order; still there is no restraining power over criminal prosecutions in this Court, but the Attorney-General will, of course, grant a *nolle prosequi* to a criminal prosecution, where an action of trespass will lie; and *pendente lite* in the Court of Chancery, this Court will stop an action of trespass *vi et armis*; and where a bill is brought to grant possession, if, after that, the plaintiff prefers an indictment for forcible entry, this Court will stop the proceedings upon such indictment (5).

(1) 3 Bl. Com. 406.

(2) *Williams v. Roberts*, 8 Hare, 315. 489.(3) *Maclaren v. Stinton*, *Maclaren v. Carron Company*, 26 L. J. (Ch.) 332;(4) *McRea v. Holdsworth*, 18 W. R.(5) *Mayor, &c. of York v. Pilkington*, 2 Atk. 302; 9 Mod. 273.

21 Beav. 152.

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The Mayor's
Court.

23. The fact that a plaintiff's title is equitable, and not legal, entitles him to the aid of a Court of Equity in the trial of his rights; and this Court will, in such a case, restrain proceedings in the Mayor's Court (1). So if a defendant is pursuing an inequitable course—as, for instance, where plaintiff and defendant are both foreigners, and the defendant is endeavouring to obtain possession of a fund, contrary to the law of the country of the plaintiff and defendant—the Court of Chancery will restrain proceedings by the defendant in the Lord Mayor's Court, by way of attachment, to obtain possession of the fund (2).

Admiralty
Court.

24. There is no doubt of the jurisdiction of the Court of Chancery to grant an injunction to stay proceedings on a bottomry bond in the Admiralty Court, where the transaction requires investigation and the subject matter is within the jurisdiction of the Court, and equities to be settled, before complete justice can be done, which can only be satisfactorily secured in the Court of Equity (3). But the Court of Chancery will not interfere to enjoin the officers of the Court of Admiralty, called upon the King's warrant to do an act with reference to the proceeds arising from a prize, declared by the Admiralty Court a *droit* to the Crown. No Court is authorized to look at such a property as any other than as belonging to the Crown, and it would militate against the policy for which the right is vested in the Crown, for this Court to interfere (4). Nor will the Court grant an injunction where the Admiralty has jurisdiction to determine whether a document has been obtained by duress and imprisonment, and is able to suppress it, of its own authority (5). There is no difficulty or question as to the existence of the jurisdiction of a Court of Equity to enforce the rights of some against the other part-owners of a ship, with regard to the management of the ship and the possession of the certificate of registry, where those rights are regulated by an agreement entered into between all the owners of the ship, it being the province of such a Court to deal with the agreement of the parties (6). So a Court of

(1) *Cotesworth v. Stephens*, 4 Hare, 185.

(2) *Jacob v. Friedburg* 21 W. R. 353.

(3) *Duncan v. M'Calmont*, 3 Beav.
409.

(4) *Nicol v. Goodall*, 10 Ves. 155;
vide Anon., 3 Atk. 350.

(5) *Anon.*, 3 Atk. 350.

(6) *Darby v. Baines*, 9 Hare, 369.

Equity will grant an injunction to restrain proceedings in the Admiralty Court, respecting a bottomry bond and freight of a ship, if that Court can more conveniently, directly, and effectually compel a defendant to do all that is necessary for the full and satisfactory investigation and determination of the rights of the parties, than the Court of Admiralty (1). So where the shares in a ship are not ascertained, the Court of Admiralty not having jurisdiction in such a case, to restrain the sailing of the ship until the share of the party complaining shall be ascertained and security given to the amount of it, the Court of Chancery will grant an injunction for that purpose (2). But if the shares in a vessel are ascertained, though a part-owner is entitled to an account against the master and other part-owners, yet a Court of Equity will not restrain the sailing of the ship until security is given for the plaintiff's shares, according to the practice of the Admiralty Court (3).

25. There is no relief in Equity against a judgment upon a security given for performing the sentence of a Court of Admiralty, although reversed on appeal, where the Court to which the appeal has been made, has no jurisdiction. Such a reversal is not only informal, but utterly null and void, and the consequence thereof is, that the first sentence becomes the final sentence, for non-performance of which, the security is forfeited (4).

26. An injunction will be granted to restrain proceedings in the Probate Court to set aside a will contrary to agreement (5). Although the Court of Chancery has jurisdiction to restrain proceedings in the Court of Probate, yet if an agreement, made with the intention of giving effect to a will believed by the parties thereto to exist, is of such a character that it will not prevent a party thereto from proceeding to take out administration, the Court will not restrain him from so doing; the question of will or no will must be determined, and the Court of Probate is the place in which it must be determined (6). If the validity of a

Probate
Court.

(1) *Duncan v. M'Calmont*, 3 Beav. 409, 417. Rep. t. Finch, 437; *vide Love v. Baker*, 1 Ch. Ca. 67; Nelson, 103.

(2) *Haly v. Goodson*, 2 Mer. 77. (5) *Gascoyne v. Chandler*, 3 Sw. 148; Dick. 281.

(3) *Castelli v. Cook*, 7 Hare, 89; *et vide Halloran v. Donal*, 9 Ir. Eq. Rep. 21. (6) *Wilcocks v. Carter*, L. R. 10 Ch. 440, 443; 23 W.R. 530; 32 L.T. (N. S.) 444.

(4) *Denew v. Stock*, 3 Sw. 662;

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Divorce and
Matrimonial
Court.

will has been already determined, and it has been acted upon, Equity will restrain proceedings in a Probate Court to controvert it (1). The old rule that the Court of Chancery would not admit a bill of discovery in aid of the jurisdiction of the Ecclesiastical Court, is not applicable to a bill for discovery in aid of proceedings in the Probate Court, that Court not having the same power of compelling discovery as the Ecclesiastical Court had (2). And after interrogatories have been filed, the Court will allow a motion to be made for an injunction to restrain proceedings in the Probate Court until answer (3).

27. A Court of Equity will restrain proceedings by a husband against his wife in the Divorce Court, for restitution of conjugal rights, in violation of a covenant not to compel cohabitation by any legal proceedings, such a covenant being no defence in that Court (4). But if a contract can be set up in the Divorce Court as a defence against a suit by the husband for a divorce—as, for instance, an agreement not to sue in the Divorce Court in respect of any cause of complaint which had arisen before the date of the deed—a Court of Equity will not interfere to stay proceedings in the Divorce Court (5). A Court of Equity will not interfere to compel or restrain the payment of alimony, as such, except so far as to grant a writ of *ne exeat* against the husband (6). But if a question arises in a separation deed, as to whether the provision for the wife excludes the right in alimony, the Court will not restrain proceedings in the Divorce Court for the purpose of obtaining alimony, pending a suit there for judicial separation; but it will put the wife under an undertaking to deal with any order the Divorce Court may make as to alimony, as the Court of Equity shall direct (7).

(1) *Sheffield v. Buckinghamshire* (Duchess of), 1 Atk. 628.

(2) *Fuller v. Ingram*, 5 Jur. (N. S.) 510; 7 W. R. 302.

(3) *Ib.*

(4) *Hunt v. Hunt*, 31 Beav. 89; 31 L. J. (Ch.) 161; 8 Jur. (N. S.) 85; 10 W. R. 215; 5 L. T. (N. S.) 778.

(5) *Brown v. Brown*, L. R. 7 Eq. 185; 38 L. J. (Ch.) 153; 19 L. T. (N. S.)

594; 17 W. R. 98. See further as to this paragraph, *Wilson v. Wilson*, 5 H. L. C. 40; 23 L. J. (Ch.) 697; *Saunders v. Rodway*, 16 Beav. 287; 16 Jur. 1005; *Worrall v. Jacob*, 3 Mer. 269; *Legard v. Johnson*, 3 Ves. 352.

(6) *Vanderyucht v. De Blaquiere*, 5 My. & Cr. 229; 8 Sim. 315.

(7) *Williams v. Bailly*, L. R. 2 Eq. 731.

28. A Court of Equity has jurisdiction to give time to apply to the Judicial Committee of the Privy Council for liberty to appeal, or to apply to a Court of Law for liberty to plead to an action on a judgment (1).

The Privy
Council.

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29. Courts of Equity will not, in general, restrain, nor is it their practice, in general, to restrain parties from applying to the Legislature, whether of this or of a foreign country (2). Applications to Parliament on public and on private grounds, are distinguishable; the latter may, in a proper case, be restrained, but the former cannot in any case be restrained by injunction; and although a Court of Equity has undoubted jurisdiction to prevent the breach of an agreement not to apply for an Act of Parliament, yet, where the agreement is, not to apply to Parliament for a measure affecting the public benefit, the Court will decline to interfere (3); and it is not necessary to decide, whether such a contract is void in itself on the grounds of public policy (4). Bills on public objects, if passed, will be passed on public grounds, which a Court of Equity cannot try; while, if such bills are rejected, the inconvenience of opposing them will be compensated in damages for a breach of any agreement not to apply to Parliament, assuming the agreement to be legal (5). But there is no doubt whatever, as to the jurisdiction of a Court of Equity to interfere, where the right of a party to petition Parliament against a bill pending there, depends solely on his having some private property or interest which is likely to be affected by it, and not as representing any interest of the public, or for the purpose of making any communication to Parliament; and such a Court has the same jurisdiction to restrain him by injunction from petitioning against a bill in Parliament, as it has to restrain him from bringing an action at Law, or from asserting any other right connected with the enjoyment of the property or interest which he claims (6).

Applications
to the Legis-
lature.

(1) *Jack v. Tease*, 12 Ir. Ch. Rep. 279.

(4) 1b.

(2) *Bill v. Sierra Nevada Lake Water and Mining Co.*, 1 De G. F. & J. 177; 6 Jur. (N. S.) 184.

(5) 1b.

(3) *Lancaster & Carlisle Railw. Co. v. North Western Railw. Co.*, 2 K. & J. 293; 25 L. J. (Ch.) 223.

(6) *Stockton and Hartlepool Railw. Co. v. Leeds and Thirsk and Clarence Railw. Cos.*, 2 Ph. 666; 5 Railw. Cas. 691, 695.

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Administra-
tion decree.

30. In the cases in which the Court of Chancery interferes to restrain creditors from proceeding either in the Courts of this country, or in foreign Courts for the recovery of their debts, the Court of Chancery does not interfere before decree, and its interference after decree is founded on this, that the decree is a judgment for all the creditors. Besides, that Court has, by the decree, the complete control of the estate, and it will not permit its jurisdiction to be interfered with (1). So if another Court in England has made a decree for the administration of an estate, the Court of Chancery will restrain proceedings at Common Law against the personal representative, as, for instance, where a decree for administration has been made in the Chancery Court of Lancaster (2).

Wills.

31. A Court of Equity will restrain a party from disputing a will in the proper Court for proving wills, after a decree has been made in the Court of Equity confirming the will (3). Courts of Equity and Courts of Law will supervise the acts of a Court for proving wills, when they are incidental to their own determinations. If an instrument comes before a Court of Equity which appears not to be an act *inter vivos*, in order to found a decree upon it as a testamentary act, it is necessary to prove it in the proper Court for proving wills; but if that Court proves there, what is an act *inter vivos*, a Court of Equity will consider the probate as void and *coram non judice* (4).

Public
functionaries
—Special
tribunals.

32. The limits within which a Court of Equity interferes with the acts of a body of public functionaries, are perfectly clear and unambiguous. So long as those functionaries strictly confine themselves within the exercise of those duties which are confided to them by the law, a Court of Equity will not interfere. The Court will not interfere to see whether any alteration or regulation which they may have directed is good or bad; but if they are departing from that power which the law has vested in them—if they are assuming to themselves a power over property which

(1) *Pennell v. Roy*, 3 De G. M. & G. 126, 137; *vide Ratcliff v. Winch*, 16 Beav. 576.

(2) *Downes v. Jackson*, 14 W. R. 907.

(3) *Buckingham v. Buckingham* 2 Eq. C. Ab. 526; *Sheffield v. Buckinghamshire*, 1 Atk. 628.

(4) *Pigott v. J'Anson*, 1 Eden 469.

the law did not give them, the Court no longer considers them as acting under the authority of that law, but treats them, whether they be a corporation or individuals, merely as persons dealing with property without legal authority (1). But no equity can be founded on an allegation that a Court legally constituted, is not properly competent to decide questions within its jurisdiction. If the Legislature has given jurisdiction to a Court provided by an Act, and has made its decision final, if any inconvenience arises from the legal exercise of the jurisdiction, the Legislature alone can apply a remedy (2). Still, if a person in whose favour an adjudication has been made by a special jurisdiction—for instance, commissioners or the Privy Council—to award compensation for confiscation of property, is affected by a trust or by fraud, the Court has jurisdiction to enforce the trust or relieve against the fraud (3).

33. The Courts exercise over the Attorney-General the same authority which they exercise over every other suitor, and the Attorney-General will not, any more than any other suitor, be permitted to prosecute any proceeding which is merely vexatious or has no legal object (4).

34. A suit in a Court of Equity, properly instituted, will prevent time from running, and a Court of Law ought to act upon this principle, the same rule being prescribed by the statute for both Courts. Such a Court, however, will protect its own jurisdiction, and will not permit a suitor to be evicted at Law who has an equitable right to sue for the land, and has filed his bill within the limits allowed, and duly pursued his remedy (5).

(1) *Frewen v. Lewis*, 4 My. & Cr. 249, 254; 9 Sim. 66. (4) *The Queen v. Prosser*, 11 Beav. 306.

(2) *Burnsley Canal Company v. Twibell*, 7 Beav. 19; 13 L. J. (Ch.) 434. (5) *Wrixon v. Vize*, 3 D. & War. 104; 2 Con. & L. 138; 1 Con. & L.

(3) *Hill v. Reardon*, 2 Russ. 608; 298; 2 D. & War. 192.
2 S. & S. 431.

CHAPTER II.

THE GENERAL DOCTRINES AND PRINCIPLES OF THE LAW OF
INJUNCTIONS.SECT. 1. *Equitable Rights—Equitable Pleas at Law.*

PART I.

1. If the right of a plaintiff, if any, is an equitable and not a legal right, he is entitled to the aid of a Court of Equity in the trial of that right, and such a Court will restrain proceedings in any other Court that has no jurisdiction to try an equitable right (1). If a Court of Law refuse to try, or cannot try, an equitable right, a Court of Equity will stay the proceedings in the Court of Law, and enforce the equitable right (2).

Equitable
pleas at Law.

2. A party will not have lost his right in Equity, by setting up a defence in an action at Law, by an equitable plea which has been demurred to, in such a way as to leave the equitable ground untouched (3). A defendant in a Court of Law, which also has equitable jurisdiction, who has not chosen to exercise his option of putting in an equitable plea, is nevertheless entitled in Equity to restrain the proceedings, and set up his equitable case (4). The fact that a party has pleaded an equitable defence at Law, does not preclude him from proceeding on other equitable grounds, to restrain the action, as where the defence in Equity is based upon the forms and practice which govern a Court of Equity (5). If a defendant at Law, who has pleaded an equitable plea to which a replication has been made, set up as a plaintiff in Equity, the same case as in his equitable defence at Law, if there is nothing to

(1) *Cotesworth v. Stephens*, 4 Hare. 185.

(2) *Farguharson v. Pitcher*, 2 Russ. 81.

(3) *Evans v. Brenridge*, 8 De G. M. & G. 100.

(4) *Gompertz v. Pooley*, 4 Dr. 448; *Kingsford v. Swinford*, 5 Jur. (N. S.) 261.

(5) *Prothero v. Phelps*, 7 De G. M. & G. 722.

shew that additional matters also set up, cannot be as well adjudicated upon at Law as in Equity, he will not be entitled to restrain the proceedings at Law (1). Where a defendant at Law pleads an equitable plea, a Court of Equity will not interfere by injunction to restrain the action on grounds identical with those averred in the plea, if the Court of Law can give the same relief as a Court of Equity; but Equity will in such a case interfere, if a Court of Law cannot give such relief as a Court of Equity, or if the case cannot be determined there on the merits, or if the circumstances are such that a Court of Equity would grant an injunction such as the Court of Law could not award (2). If a Common Law Court refuse to permit a defendant to plead an equitable plea, where it is one that Equity would have allowed, the defendant is entitled in Equity to restrain the proceedings at Law (3).

SECT. 2. *Legal Rights—Legal Title.*

1. If there is any doubt as to the exclusive legal title of a party claiming an injunction in aid of that legal title, a Court of Equity will not exercise jurisdiction, without giving an opportunity of trying the legal title (4). Where equitable relief by way of injunction is sought in aid of a legal right, a Court of Equity, unless such right is clear, will not, except with the consent of both parties, declare the legal right and grant a perpetual injunction founded on such declaration, but will require the question to be first tried (5).

2. If a plaintiff's title is doubtful, and depends on questions more suitable for a trial at Law, and the injury is not very material, and has been in progress with the plaintiff's knowledge, and is completed before the filing of his bill, the Court will not try the legal question of title, but leave him to try it at Law, and if he succeed

(1) *Farebrother v. Welchman*, 3 Dr. 122; 24 L. J. (N. S.) Ch. 410; 1 Jur. (N. S.) 126.

(2) *Waterlow v. Bacon*, L. R. 2 Eq. 514; 12 Jur. (N. S.) 614.

(3) *Magnay v. The Mines Royal Company*, 3 Dr. 130.

(4) *Bramwell v. Halcomb*, 3 My. & Cr. 737, 736.

(5) *Cardiff (Mayor, &c.) v. Cardiff Waterworks*, 4 De G. & J. 596.

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he may then seek the aid of the Court of Equity (1). Still the mere existence of doubt is not sufficient to prevent the Court from granting an injunction; such a doctrine would interfere theoretically and practically with the jurisdiction of the Court daily exercised, to a very great extent. The circumstances of the legal right being in doubt, is a matter for serious attention, but does not render it incumbent on the Court to refuse an injunction; the Court must be guided by a discretion according to the exigencies and the nature of each particular controversy (2). But Courts of Equity may now determine legal rights, where equitable relief is consequent upon, or ancillary to, their establishment; and in such instances (unless the balance of convenience is otherwise), if a plaintiff has a reasonably clear legal title, he need not first establish his right by an action (3). Although there be a submission to an injunction restraining the violation of a legal instrument, yet a Court of Equity will not make any further declaration of the legal rights, with reference to possible future acts (4).

3. On a bill to restrain the exercise of a legal right, it is the duty of the plaintiff to satisfy the Court, that there are substantial grounds for doubting the existence of the legal right (5). When a plaintiff comes for an injunction to restrain a defendant from the prosecution of his legal right, there are several things to be considered; not only is the amount of the injury which might be done to be taken into account, but also the extent to which the decision at Law upon the subject could go, and the degree of certainty, more or less, in reference to that decision; and taking these several matters into consideration, the Court will, in some cases, refuse to interfere at all, and in others, refuse to interfere otherwise than by postponing the question for a time, and giving the opportunity of bringing an action in the meanwhile; but in certain other cases, where justice could not be done without it between the parties, the Court, notwithstanding the inconvenience, will grant the injunction in the first instance, and will not leave the party to any other

(1) *Ward v. Higgs*, 12 W. R. 1074.

(2) *Ollendorf v. Black*, 4 De G. & Sm. 209, 210.

(3) *Mulville v. Fallon*, 6 Ir. R. Eq. 458.

(4) *Att.-Gen. v. Boyle*, 10 Jur. (N.S.) 309.

(5) *Sparrow v. Oxford, Worcester, v. Wolverhampton Railw. Co.*, 9 Hare, 441; 2 De G. M. & G. 94.

course of proceeding to ascertain the legal right; which of these courses is the proper one to be followed, must depend on all the circumstances of each particular case (1). The object of the interference of a Court of Equity by interlocutory injunction between two parties who are at issue upon a legal right, is solely the protection of the property in dispute until the legal right shall have been ascertained; therefore, such an injunction ought always to be accompanied by a provision for putting the question into a course of speedy investigation at Law (2). But the Court ought not to interfere upon an interlocutory application for the purpose of preventing a party from enforcing a legal claim, without securing to itself the means of putting him in the same position, in the event of his turning out to be right, as if the Court had not interfered (3). A probability of right is sufficient to sustain an injunction (4). The Court will, in many cases, interfere to preserve property *in statu quo* during the pendency of a suit in which the rights to it are to be decided, and that, without expressing, and often without having the means of forming, any opinion as to such rights; it is true the Court will not interfere if it thinks that there is no real question between the parties, but if it sees that there is a substantial question to be decided, it will preserve the property until such question can be regularly disposed of, and in order to support an injunction for such purpose, it is not necessary for the Court to decide upon the merits in favour of the plaintiff; if the bill states a substantial question between the parties, the title to the injunction may be good, although the title to the relief prayed may ultimately fail (5). But the circumstances of the case, at the time when the motion is made, must be such as to enable the Court to interfere between the parties, or to put the question between the parties into a course of trial, and where that is not the case, the motion will not be allowed to stand over till the purpose has been so far executed as that its character may be judged of, but will be at once refused (6). Doubts in matters

(1) *Dalglisch v. Jarvie*, 2 Mac. & G. 231, 242; 2 H. & Tw. 437.

(2) *Harman v. Jones*, Cr. & P. 299.

(3) *Sanxter v. Foster*, Cr. & P. 302.

(4) *Tonson v. Walker*, 3 Sw. 679.

(5) *Great Western Railw. Co. v. Birmingham and Oxford Junction Railw. Co.*, 2 Ph. 597.

(6) *Haines v. Taylor*, 2 Ph. 209; 10 Beav. 75.

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of law are always sufficient ground for continuing an injunction once granted (1). The Court will not grant an injunction to restrain parties from proceeding to deal with property, whose right, if it exists, depends upon the construction of a doubtful statute, where the granting of the injunction would for ever deprive them of an opportunity of exercising the right, especially if no danger exists from allowing them so to proceed (2). A Court of Equity may interfere where a man unconscientiously exercises a legal right to the prejudice of another; and an act may, in some sense, be regarded as unconscientious, if contrary to the dictates of prudence and reason, although the actor does the act without any malicious motive (3). Where a party is prevented by the Court from proceeding to establish his right at Law, it is the duty of the Court to see that no injury arises to him in consequence of its interference (4). Although it has been decided by the highest Court of Appeal that where a person possesses a legal right, a Court of Equity will not interfere to restrain him from enforcing it, though between the time of its creation and that of his attempt to enforce it, he has made representations of his intention to abandon it, and that Equity will not interfere, even though the parties to whom these representations were made have acted on them, and have in a full belief in them entered into irrevocable engagements, and that to raise an equity in such a case there must be a misrepresentation of existing facts, and not of mere intention (5); yet it would nevertheless appear to be the more correct doctrine, that it is immaterial whether there is a misrepresentation of a fact as it actually existed, or a misrepresentation of an intention to do or abstain from doing any act which would lead to the damage of the party whom you thereby induced to enter into irrevocable engagements, as for instance, to deal in marriage, or in purchase, or in anything of that sort, on the faith of that representation (6).

4. The equity of a plaintiff's case may consist in the mode

(1) *Maxwell v. Ward*, 11 Price, 3.

O'Donel v. Browne, 1 Ball & B. 262.

(2) *Att.-Gen. v. Liverpool (Mayor of)*, 1 My. & Cr. 171.

(5) *Jordan v. Money*, 5 H. L. C. 185;

23 L. J. (Ch.) 865; *Money v. Jordan*,

(3) *Turner v. Wright*, 6 Jur. (N.S.) 809.

2 De G. M. & G. 318; 21 L. J. (Ch.) 531; *vide Coles v. Pilkington*, post.

(4) *Pulteney v. Warren*, 6 Ves. 73;

(6) *Ib.*

adopted by the defendant of exercising a certain right, rather than the want of such a right itself, involving the necessity of a summary interference to reconcile the conflicting claims of the parties (1).

5. A defendant must take the right method of asserting his right, if he has any, and will not be allowed to define for himself the plaintiff's right and interfere with his possession. A defendant will not be allowed to exercise his right according to his own judgment without reference to the rights of the plaintiff, that would be a lawless mode of vindicating his rights, and it cannot be allowed; in such a case, if a defendant has any right beyond what the plaintiff is willing to concede to him, he must bring his bill or action to have those rights defined before they can be enforced (2).

6. Where the rights of the plaintiff and the defendant are legal, the plaintiff, in asking for an injunction to protect him from a violation of his alleged legal right, ought to shew that the right has been established; or that having had no means of establishing it, but the right being *prima facie* well founded, the interference of a Court of Equity is necessary to prevent that species and extent of mischief which such a Court calls irre-mediabale, before the legal right can be established (3).

7. When the Court has interfered in aid of a legal right by granting an injunction upon the terms of the plaintiff bringing an action, it will deprive the plaintiff of the injunction if he does not proceed to trial; but there must be promptness on the part of the defendant in applying to the Court for an order that the plaintiff should proceed to trial within a short period, as, for instance, within ten or even twenty-one days, and there must be no acquiescence in the injunction by delay in so doing, as, for instance, for sixteen months after the injunction has been obtained (4).

8. If the matter in dispute is distinctly raised by the motion for an injunction, and is ready for decision, the right should be

(1) *Erie, &c. v. Walker*, 29 Penn. 2 Ves. Sen. 414; *Ashworth v. Browne*, 173 (Amr.). 10 Ir. Ch. Rep. 421.

(2) *Ib.*

(4) *Bickford v. Shewes*, 4 My. &

(3) *Hilton v. Lord Granville*, 4 Cr. 498; 10 Sim. 193.
Beav. 130; Cr. & P. 283; *vide Anon.*

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declared and the injunction founded thereon, that the order may inform the defendant what the opinion of the Court is, as to the limits of his right, and not expose him, in the exercise of such right, to the consequences of violating a vague injunction (1).

9. A plaintiff must satisfy the Court that he has sustained substantial damage from the violation of a legal right to entitle him to an injunction (2).

10. If a plaintiff apply for an injunction in respect of a Common Law right, and the existence of that right, or the fact of its violation, is denied, he will be obliged to establish his legal right before he will be entitled to an injunction to prevent the recurrence of that violation (3). The Court will not generally, in doubtful cases, restrain by injunction the infringement of an asserted legal right, until its validity has been established; yet it is otherwise if there has been long uninterrupted enjoyment, that being regarded as *prima facie* evidence of title (4).

11. A Court of Equity frequently refuses an injunction where it acknowledges a right, when the conduct of the party complaining, has led to the state of things that occasions the application; in such cases strict law only ought to govern (5).

12. There is no jurisdiction in Equity to order a legal instrument to be delivered up, on the ground of illegality which appears on the face of the instrument itself (6). The result of an examination of the authorities seems to be, that if a party has wrongfully obtained possession of a legal instrument, for instance, of a bill of exchange, although under circumstances which would give a complete defence at Law, Equity will nevertheless interfere, if from lapse of time, or death of witnesses, such defence is likely to fail; but that if the objection, being apparent on the face of the instrument, must always be open to the defendant, whenever

(1) *Cotter v. Midland Railw. Co.*, 1319; *Broadbent v. Imperial Gas-Light Co.*, 3 L. J. (N. S.) 221; 2 L. J.

(2) *Holyoake v. Shrewsbury and Birmingham Railw. Co.*, 5 Railw. Cas. 421. (N. S.) 1132.

(4) *Stevens v. Keating*, 2 Ph. 133.

(5) *Rundell v. Murray*, Jac. 311.

(3) *Imperial Gas Light and Coke Co. v. Broadbent*, 7 H. L. C. 600; 7 De G. M. & G. 436; 5 Jur. (N. S.)

(6) *Simpson v. Lord Howden*, 3 My. & Cr. 97.

such action shall be brought against him, he is not entitled to apply to a Court of Equity for relief (1).

13. A plaintiff who comes to a Court of Equity for its aid, is bound to put under the control of the Court, his legal rights relating to the subject-matter of the litigation (2).

14. If it appear that a previous adjudication in Equity proceeded not on the validity of the legal title, but on the absence of an equity to countervail it, a Court of Equity will not restrain an action, on the ground that the matters in question have already been adjudicated on, in Equity (3).

15. Although a Court of Equity will restrain the setting up of an outstanding term to prevent the fair trial of a legal right, yet after the trial of an ejectment has taken place, and a term has been set up, whereby the trial of the merits of the case was prevented, and the party using it obtained a verdict and judgment, a suit cannot be sustained to set that judgment aside, nor will the fact that the communications made before the trial by the party who so gained the advantage at Law led the other party to believe that the substantial question of the title would be tried in the ejectment, enable him to sustain a suit for such a purpose ; but if there be any impediment to the trial of the legal right in another action of ejectment, a suit may be sustained for relief by removing that impediment to the trial of the right in such future action (4).

16. Although a suit has been brought to quiet title, and a decree for the plaintiff has enjoined further contesting such title, yet the defendant may still set up an after-acquired title (5).

SECT. 3. *No adequate Relief at Law—Injury irreparable.*

1. If it is impossible to obtain adequate relief at Law, or to estimate the damage to which a party will be exposed if an injunc-

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| (1) <i>Jones v. Lane</i> , 3 Y. & C. 294; | (3) <i>Waine v. Crocker</i> , 31 L. J. (Ch.) |
| <i>vide Cooper v. Joel</i> , 27 Beav. 313; | 285. |
| <i>Williams v. Roberts</i> , 8 Hare, 315. | (4) <i>Master, &c., of Clare Hall v.</i> |
| (2) <i>Prothero v. Phelps</i> , 7 De G. M | <i>Harding</i> , 6 Hare, 273. |
| & G. 722; 2 Jur. (N. S.) 173. | (5) <i>Wetherbee v. Dunn</i> , 10 Min. |
| | 106 (Amr.). |

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tion is not granted, and the injury will be irreparable, a Court of Equity will grant an injunction, and that notwithstanding misconduct on the part of the applicant in not strictly and honorably performing his part of the agreement (1).

SECT. 4. *Delay, Laches—Standing by, Acquiescence, Conduct of Plaintiff—Notice—Ignorance—Mistake.*

Delay,
Laches.

1. Where there is delay in the assertion of a legal right, and the damage is slight, a Court of Equity will not grant an injunction to restrain an infringement on the legal right (2). A delay of twelve years in making a complaint will not, in some cases, amount to acquiescence, or to an abandonment of the plaintiff's rights (3). In cases of obstruction of ancient lights, a delay of five weeks may not, under circumstances, amount to such acquiescence as to disentitle a plaintiff to relief at the hearing (4). Although a plaintiff submit to an injury for nearly four years trusting to an assurance that a scheme was being carried out, by which eventually the evil complained of—for instance, a nuisance—would be removed, yet he is not precluded, on the ground of laches, from applying for an injunction; the rule in such cases being, that the mere prospect of injury does not give a right to this relief (5).

2. Time is an ingredient which is to be considered in determining a question of injunction, although the application be on behalf of the Attorney-General, and laches may be a defence to such an application by way of information, as well as upon bill (6). A party may by laches preclude himself from being

(1) *Holmes v. Eastern Counties Railw. Co.*, 2 K. & J. 675; 3 Jur. 277. (N. S.) 737. (4) *Johnson v. Wyatt*, 2 De G. J. S. 18; 33 L. J. (Ch.) 394; 9 Jur. (N. S.) 1333; *vide Swaine v. Gre Northern Railw. Co.*, 10 Jur. (N. S.) 19.

(2) *Wintle v. Bristol and South Wales Union Railw. Co.*, 10 W. R. 210. (5) *Att.-Gen. v. Birmingham (Borough Council)*, 4 K. & J. 528.

(3) *Hartlepool Gas and Water Co. v. West Hartlepool Harbour and Railw. Co.*, 12 L. T. (N. S.) 366; *et vide Gullick v. Tremlett*, 20 W. R. (6) *Att.-Gen. v. Sheffield Gas Consumers' Co.*, 3 De G. M. & G. 304.

entitled to relief in Equity, without first establishing his right at law (1). It is a general principle that parties seeking an injunction must come forward speedily (2). If a party is guilty of laches, or unreasonable delay in the enforcement of his rights, he thereby forfeits his claim to equitable relief; more especially where a party, being cognisant of his rights, does not take those steps to assert them which are open to him, but lies by, and suffers other parties to incur expenses and enter into engagements and contracts of a burdensome nature (3).

3. The Court will not grant a decree for specific performance of a contract where there has been laches in applying to the Court; and in contracts relating to commodities fluctuating from day to day in market price, the Court expects persons to become unusually vigilant and active in asserting their right to specific performance, which it is inequitable to grant after too long an interval, and when the parties may be no longer in the same position (4). But if the delay in prosecuting a bill for specific performance of an agreement is attributable to embarrassment in circumstances, and laches on the part of the defendant in dismissing the bill, a Court of Equity will decree specific performance (5).

4. Where the Court summarily interferes against the legal possession, it has a right to expect a plaintiff to proceed with the most complete and honest diligence to obtain a decree; and delay in his proceedings constitutes an objection to the proposed interference (6).

5. Creditors may, by their laches, forfeit whatever equity they may have by way of lien upon a hereditament (7).

6. A continual claim, without any active steps in support of it, will not keep alive a right which would otherwise be barred by

(1) *Weller v. Smeaton*, 1 Cox, 402.

(2) *Isaacson v. Thompson*, 20 W. R. 97; 41 L. J. (Ch.) 101.

(3) *Tash v. Adams*, 10 Cush. 253 (Amr.); *et vide Grey v. Ohio, &c.*, Grant, 412; *Burden v. Stein*, 27 Ala. 104; *Long v. Cross*, 5 Jones, Eq. 223; *Whitney v. Union, &c.*, 11 Gray, 359 (Amr.).

(4) *Pollard v. Clayton*, 1 K. & J. 462.

(5) *Moore v. Blake*, 4 Dow. 230; 1 B. & B. 62.

(6) *Owen v. Homan*, 4 H. L. C. 997.

(7) *Houlditch v. Wallace*, 5 Cl. & F. 629; 1 D. & Wal. 490; *Wallace v. Donegal (Marquis of)*, 1 D. & Wal. 461; *et vide Houlditch v. Donegal (Lord)*, 8 Bli. 340.

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laches (1). It would be a dangerous doctrine to allow that the mere assertion of a claim, unaccompanied by any act to give effect to it, could avail to keep alive a right which would otherwise be precluded (2).

7. The Court cannot avoid being influenced by any delay which may occur in the institution of proceedings by a plaintiff; such delay, though it may not amount to absolute proof of acquiescence, is yet calculated to throw considerable doubt upon the reality of the injury alleged by the plaintiff, and will compel the Court to weigh the amount of inconvenience which the plaintiff will sustain by the refusal to grant the particular remedy of an injunction, against any serious consequences which must result to the defendant—for instance, a company—from an order which would oblige them to alter the state and condition of their works (3).

Standing by,
Acquiescence,
Conduct of
plaintiff.

8. A party who has stood by while another person has laid out money on the faith of representations made to him by that party, will not be allowed, by means of obtaining an increased interest in the property, to destroy the residential value of the property upon which the money has been laid out (4). A party claiming a title in himself, but privy to the fact of another dealing with the property as his own, will not, in Equity, be permitted to assert his own title against a title created by that other party, although he derives no benefit from the transaction (5).

9. Acquiescence, although not conferring a right on the opposite party, deprives a complainant of his right to the interference of a Court of Equity. Unless an applicant has acted promptly, he is held to have impliedly authorized what he, by his application, objects to (6). At the hearing of a cause, a much greater degree of acquiescence must be shewn, to deprive parties of their rights, than would be a sufficient defence to an interlocutory application; a degree amounting in fact, not only to positive license, but to an

(1) *Lehmann v. McArthur*, L. R. & J. 33; 1 Joh. 341; 6 Jur. (N. S.) 129.

(2) *Clegg v. Edmondson*, 8 De G. M. & G. 787, 810. (5) *Nicholson v. Hooper*, 1 My. & Cr. 179.

(3) *Ware v. Regent's Canal Co.*, 3 De G. & J. 212, 230. (6) *Binney's Case*, 2 Bland. 99 (Amr.)

(4) *Piggott v. Stratton*, 1 De G. F.

mplication of an actual grant (1). There is a distinction between the effect of acquiescence, upon a motion for an injunction, and on a demurrer; in the former case, acquiescence merely prevents the special protection by injunction; but in the latter it must be such as to disentitle the plaintiff to any relief whatever (2). If a man stands by and allows another to erect a building on his ground, and afterwards agrees as to the rent to be paid for it, neither the owner of the land, nor any person claiming under him, can dispute the right of the builder to use the land (3). And there are several instances where a man has suffered another to go on building upon his ground, and not set up a right till afterwards, when he was all the time cognizant of his right, and the person building had no notice of the other's right, in which the Court will oblige the owner of the ground to permit the person building, to enjoy it quietly and without disturbance (4). So a creditor will be restrained from bringing any action against his debtor on the ground of a breach of a covenant to insure for a certain sum to secure the debt, if the creditor was aware that the sum insured was less than the sum agreed upon; such conduct is considered by the Court as shewing acquiescence by the creditor in the breach, and he will not be allowed to take advantage of the breach (5). So the heir-at-law who has long acquiesced, and also acted as a devisee in trust under the will of his ancestor, will be held to have lost his right to an issue *devisavit vel non*, if the Court is satisfied that the whole estate has passed (6). Acquiescence for six years in a bond fraudulently obtained by a party in a fiduciary situation, will disentitle his executor to be relieved from proceedings at Law on the bond (7). A party allowing and acquiescing in erecting a nuisance, will be stayed in an action at Law (8).

(1) *Patchin v. Dubbins*, 1 Kay, 1.(2) *Gordon v. Cheltenham Railw. Co.*, 5 Beav. 229.(3) *Mold v. Wheatcroft*, 27 Beav. 510.(4) *The East India Co. v. Vincent*, 2 Atk. 83.(5) *Watts v. Hyde*, 17 L. J. (N. S.) Ch. 409; 12 Jur. 661.(6) *Man v. Ricketts*, 7 Beav. 93; *et vide Elliot v. Merriman*, 2 Atk. 41; Bar. 78.(7) *Walmesley v. Booth*, 2 Atk. 25; Bar. 475.(8) 2 Eq. Ab. 522; *et vide Lord Guernsey v. Rodbridges*, Gilb. Eq. Reps. 3.

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10. A corporation can be bound by its acquiescence (1). So a company is as much bound by acquiescence as an individual, notwithstanding the want of a formal contract (2). And so of a corporation, though its agreement is not under the seal of the corporation (3). An injunction will not be granted where, according to the case made by the plaintiff, there has been long acquiescence under the injury against which he at length seeks protection (4).

11. It would seem that a stronger case of acquiescence is requisite to debar a plaintiff from relief at the hearing of a cause, than to disentitle him to an interlocutory injunction (5).

12. A claim for compensation is no acquiescence, if the party was, at the time he made the claim, ignorant that the defendants were doing an illegal act, and he takes proceedings as soon he is aware of it (6).

13. Though where the Attorney-General sues in the Court of Chancery for the vindication of a public charity, neither acquiescence nor lapse of time will be any bar to the proceedings, there is no such principle or rule where the suit is instituted by private persons, in a manner affecting solely their own individual interests; on the contrary, in such a case, acquiescence and lapse of time will be a bar (7).

14. A Court of Equity frequently refuses an injunction where it acknowledges a right, when the conduct of the complaining party had led to the state of things which occasions the application. Not only conduct with the party with whom the contest exists, but conduct with others, may influence the Court in the exercise of its equitable jurisdiction by injunction (8).

15. Where property, either immoveable or moveable, is disposed of, with notice of a prior contract entered into by the person dis-

Notice.

(1) *Crook v. Corporation of Sea-ford*, 18 W. R. 1147; 19 W. R. 938; L. R. 6 Ch. 551; 25 L. T. (N. S.) 1. 18; 33 L. J. (Ch.) 394; 9 Jur. (N. S.) 1333; *vide Swaine v. Great Northern Railw. Co.*, 10 Jur. (N. S.) 191.

(2) *Laird v. Birkenhead Railw. Co.*, Joh. 500; 29 L. J. (Ch.) 218.

(3) *Crook v. Corporation of Sea-ford*, *supra*.

(4) *Bailey v. Taylor*, 1 Russ. & My. 73, 76; 3 L. J. (Ch.) 66.

(5) *Johnson v. Wyatt*, 2 De G. & S.

(6) *Pentney v. Lynn Paving Commissioners*, 13 W. R. 983.

(7) *Cairneross v. Lorimer*, 3 Macq. H. L. C. 827; 7 Jur. (N. S.) 149.

(8) *Rundell v. Murray*, Jac. 311 *et vide Saunders v. Smith*, 3 My. & Cr. 711, 730.

posing of it, for its use in a particular manner, the person taking it with such notice may be restrained from using it otherwise (1). It may be stated, at least as a general rule, that where a man by gift or purchase acquires property from another, with a knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller (2). And the doctrine is the same in cases of constructive notice (3). And wherever a party is put on inquiry, and has thus constructive notice of a right, he is bound by it, and will be restrained from violating that right (4).

16. If ignorance alleged by a plaintiff, is of a fact which he is bound to know, he cannot probably suggest that effectually as an excuse; but if it is ignorance of a fact which he is not bound to know, it is otherwise (5). Ignorance.

17. Notwithstanding the enunciation of a doctrine to the contrary (6), there is no doubt that Courts of Equity have power to give relief in cases of mistake of law, as well as in cases of mistake of fact (7). Mistake.

18. Although a party and his tenants acting under a mistaken supposition that the party is entitled to the property, respectively, as to the one, grant a lease, and as to the other, expend money in rebuilding the premises, yet if the actual owner knows the true state of the title, and claims the property before the improvements are commenced, he will not be restrained from suing out or

(1) *De Mattos v. Gibson*, 4 De G. & J. 276, 282; 28 L. J. (Ch.) 165, 498.

(2) *Ib.*; *et vide Messageries Impériales v. Baines*, 11 W. R. 322.

(3) *Clement v. Welles*, 35 Beav. 513; L. R. 1 Eq. 200; 35 L. J. (Ch.) 265.

(4) *Hervey v. Smith*, 22 Beav. 299; 1 K. & J. 389.

(5) *Hodgkinson v. National Live Stock Insurance Co.*, 4 De G. & J. 422; 26 Beav. 473.

(6) *See Midland Great Western of Ireland Railw. Co. v. Johnson*, 6

H. L. C. 798; 4 Jur. (N. S.) 643; *Hubbard v. Martin*, 8 Yerg. 498 (Amr.); *Cockerel v. Cholmeley*, 1 R. & M. 418.

(7) *See In re Saxon Life Assurance Society*, 2 J. & H. 408; 32 L. J. (Ch.) 207; 10 W. R. 724; *Stone v. Godfrey*, 5 De G. M. & G. 76; *Saunders v. Annersley (Lord)*, 2 Sch. & Lef. 73; *Beauchamp (Earl) v. Winn*, L. R. 6 H. L. 223; *Kelvington v. Parker*, 21 W. R. 121; *Dunlap v. Stetson*, 4 Mas. 349 (Amr.).

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executing a writ of possession under an action of ejectment and evicting the tenant (1). In such a case the principle is the same, whether the owner and the party making the expenditure by mistake are strangers or tenants in common of the property. If the owner has once and recently given notice of his claim to the property, he is not, in order to exclude any equity in respect of the expenditure, on the ground of mistake by the party in possession, or of acquiescence on his own part, bound again to assert it when the expenditure begins or while it is going on. In order to exclude such equity, it is not necessary that the notice of his claim, given by the claimant to the party in possession, should disclose any particulars relating to the title; nor, if the claim which he made exceeded what he was entitled to, is the party in possession justified in disregarding it or supposing it to be unfounded (2). If a party in possession of an estate, knowing that that another claims the property, will, with his eyes open, spend money upon it, there is no case known in which it has been held that he can, in the absence of special circumstances, keep the lawful owner out of possession unless he will reimburse the party in possession the expenditure he has made. That would, indeed, be improving a man out of his estate. And the same reasoning must apply where one party claims to be tenant in common with another, and that other denies the tenancy and claims the entirety of the property. And where a party has once given distinct notice of his claim, the onus is on the other side to shew that he has abandoned, or given reason to believe that he has abandoned his claim (3).

19. The making of a payment into a Court of Law by a defendant in an action, in ignorance of the legal consequences of the act, does not amount to such a mistake as calls for the interference of a Court of Equity, if the act is binding at Law; and a Court of Equity will not restrain the plaintiff at Law from doing that which he is then entitled to do, namely, to stay the action and take out of Court the money so paid in (4).

20. If a lease is made for a shorter term than that which was contracted for, the persons claiming a reversion upon the expiration

(1) *The Master &c. of Clare Hall v. Hurdling*, 6 Hare, 273.
(2) *Ib.*

(3) *Ib.*
(4) *Great Western Railw. Co. v. Cripps*, 5 Hare, 91.

of the lease, will be restrained from taking advantage of the mistake (1).

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21. If there is such a mistake in an agreement as to render it null and void, a Court of Equity will order it to be delivered up to be cancelled, and will restrain an action upon it (2).

SECT. 5. *Abuse of Confidence—Fraud, Deceit, Misrepresentation—Breach of Trust, Trusts, Trustees—Undue Influence—Parties in pari delicto, Particeps criminis—Unconscionable Bargains.*

1. If the right to a benefit taken by a person in a confidential situation be questioned in Equity, and it is sought to be sustained as an exercise of liberality, it must be shewn that it was the intention of the party from whom the benefit emanated, to be liberal; but intention imports knowledge, and liberality imports the absence of influence, and the onus of establishing a gift in such circumstances, rests with the party who has received (3); and actions upon instruments shewn to have been obtained by abuse of confidence will be restrained, and the instruments will only be allowed to stand as a security for what is justly due (4).

Abuse of
confidence.

2. To set aside bargains at Law, fraud must be proved, but Equity relieves against presumptive fraud, and against demands founded on unconscionable bargains and contracts (5). In almost every case upon the subject of advantages gained by fraud and breach of trust, a principal ingredient is a degree of weakness short of legal incapacity, and more liability to imposition than the generality of mankind (6).

Fraud, Deceit,
Misrepresentation.

3. If the fraud alleged is not such as a Court of Law can necessarily deal with, a plaintiff at Law will not be precluded by reason of his having commenced an action at Law, from coming to a Court of Equity, to prevent the defendant at Law from setting up there an instrument gained by his fraud (7); and it is not necessary that

(1) *Wilde v. Ashley*, 2 Jur. 679.

(5) *Chesterfield v. Janssen*, 1 Atk.

(2) *Price v. Ley*, 9 Jur. (N. S.) 295; 352.

11 W. R. 399, 475.

(6) *Griffin v. Deveauille*, 3 P. Wms. 130, n. (1), 5th Ed.

(3) *Billage v. Southec*, 9 Hare, 534;

S. C. *sub. nom. Billing v. Southec*, 26

L. J. (N. S.) Ch. 472; 16 Jur. 188.

(7) *Stewart v. Great Western Railw. Co.*, 2 Dr. & Sm. 438; 2 De G. J. & S.

(4) *Ib.*

319; 13 L. J. (N. S.) 79; 13 W. R. 907.

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the plaintiff should ask for compensation or any other consequential relief in Equity; a plaintiff who seeks the interference of a Court of Equity is not bound, as the price of such interference, to bring the whole matter into Equity (1). A Court of Equity has jurisdiction to grant an injunction to restrain an action at Law, on the ground of legal, as well as of equitable fraud, and to determine the legal fraud (2). If a case of fraud is made by a bill, and is not established by the evidence, and another case for relief is alleged in the same bill and proved, the true rule is, that so much of the bill is to be dismissed as relates to the charge of fraud, and that relief may be given upon the other part of the case which is established (3). But if a case of actual fraud is alleged, the plaintiff cannot fall back upon a case of constructive fraud (4). In every case where a plaintiff comes to a Court of Equity to set aside a deed on the ground of fraud, it is necessary that there should be clear and unequivocal proof of the facts which are said to constitute the fraud, and it must be shewn that the facts are such as in the eye of the Court amount to fraud (5). *Suggestio falsi* or *suppressio veri*, to operate as a ground for the postponement of an equity, must occur in the transaction which *dat locum contractui* (6).

4. A person is entitled to an injunction to restrain interference with property which he has been induced to convey to another, by means of the fraudulent misrepresentations of that party; and it is no objection to the relief that that person had throughout the transaction, the means, equally with the party committing the fraud, of knowing what his rights were, and of obtaining competent advice respecting them (7). Although it may be impossible to give a definition of what constitutes fraud in the contemplation of a Court of Equity, so as to meet all the various combinations of circumstances to which that word may apply, yet there can be no

(1) *Stewart v. Great Western Railw. Co.*, 2 Dr. & Sm. 438; 2 De G. J. & S. 319; 13 L. J. (N. S.) Ch. 79; 13 W. R. 907.

(2) *Clarke v. Manning*, 7 Beav. 162.

(3) *Parr v. Jewell*, 1 K. & J. 671.

(4) *Wilde v. Gibson*, 1 H. L. C. 605; *Parr & Jewell*, 1 K. & J. 671, 674.

(5) *Lumley v. Desborough*, 22 L. T. (N. S.) 597.

(6) *Rolt v. White*, 3 De G. J. & S. 360.

(7) *Reynell v. Sprye*, *Sprye v. Reynell*, 8 Hare, 222; 1 De G. M. & G. 660, 691; 21 L. J. (Ch.) 633.

difficulty in saying, that whenever any one has by wilful misrepresentation, induced another to part with his rights, in the belief that such representations were true, this is in the plainest and most obvious sense a fraud which a Court of Equity will not tolerate (1).

5. If the intent of a voluntary conveyance of land to another, is to enable that party, with the privity of the grantor, to obtain a marriage settlement and a portion, the grantor not refuting the general opinion that the grantee was the sole owner, such an intention and acts are fraudulent, and the Court will restrain any proceedings by the grantor under a defeasance executed at the same time by the grantee of the land (2).

6. An attorney will be restrained from proceeding against a partner for the instalments of a premium, accruing after a dissolution, for admission to the partnership, where he has made the new partner a bankrupt, whereby the partnership is dissolved (3). And the same equity applies to the assignees in bankruptcy of the attorney; so also to a *bonâ fide* creditor to whom the instalments have been assigned by way of security (4). If an heir-at-law, being a solicitor, advise the execution of a deed which will have the effect of revoking a prior will, and fraudulently omit to tell the effect the deed will have upon the devise of the property, he will be restrained from proceeding in ejectment, and decreed to be a trustee of the lands for the devisee (5); and ignorance of the effect of the deed, and omission to inquire whether a will had been made, are such professional ignorance and neglect as afford a principle by which a Court of Equity may, independently of the ground of fraud, hold the solicitor to be a trustee for a third person of any benefit resulting to himself (6).

7. If a plaintiff at Law is nonsuited for want of evidence which the defendant has in his power and withholds from the plaintiff, the latter will be relieved in Equity (7). If the circumstances with reference to an existing firm, contained in a trade circular issued

(1) *Reynell v. Sprye*, *Sprye v. Reynell*, 8 Hare, 222; 1 De G. M. & G. 660, 691; 21 L. J. (Ch.) 633.

(2) *Webber v. Farmer*, 4 Bro. P. C. 170.

(3) *Humil v. Stokes*, 4 Price, 161.

(4) *Ib.*

(5) *Bulkley v. Wilford*, 2 Cl. & F. 102; 8 Bli. (N. S.) 11.

(6) *Ib.*

(7) *Wilmot v. Lennard*, 3 Sw. 682; *et vide Field v. Beaumont*, 1 Sw. 209.

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by parties commencing a new business of the same kind, are not such as in the circular mentioned, that is a deceit upon the trade and the public, and a Court of Equity will restrain the further issuing of the circular (1).

8. Acquiescence in the alleged fraud, by delay, with presumptive knowledge of the fraud, will prevent an injunction founded upon such fraud (2). All parties to a fraud will be restrained from taking advantage thereof, and also an assignee from one of the parties to the fraud, for valuable consideration without notice of the fraud, of a judgment, will also be restrained from the execution thereof upon land obtained by the fraud of the party who confessed the judgment (3).

9. If a matter, for instance a charge of fraud, is as fit for the decision of a jury as for that of a Court of Equity, and the Courts of Equity and Common Law have concurrent jurisdiction in the case, and a Court of Common Law has been set in motion in the first instance, a Court of Equity will not restrain the proceedings at Law (4). But if, in such a case, a bill is filed in the first instance, and the Court of Equity has obtained jurisdiction over the matter, the Court will prevent the defendant bringing his action afterwards (5). A Court of Equity will not interfere to protect a party from being sued on an instrument fraudulently contrived for the purpose of depriving others of their remedies against that party, for instance, for the purpose of delaying creditors (6), and that although the attempt turns out to be ineffectual (7).

10. If a defendant, on a treaty of marriage by the plaintiff with the daughter of one of the other plaintiffs, has represented to the agent of the other plaintiffs that there was no such demand as that sued upon existing, a Court of Equity will restrain the defendant from recovering the demand (8).

11. If a remainderman in tail has acquiesced and encouraged the next of kin in remainder for life without impeachment, &c.,

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| (1) <i>Stevens v. Paine</i> , 18 L. T. (N.S.) 600. | (5) <i>Ib.</i> |
| (2) <i>Helms v. McFadden</i> , 18 Wis. 191 (Amr.). | (6) <i>Bateman v. Ramsey</i> , Sau. & Sc. 459. |
| (3) <i>Livingston v. Hubbs</i> , 2 John, Ch. 512 (Amr.). | (7) <i>Ib.</i> |
| (4) <i>Norris v. Day</i> , 4 Y. & C 475. | (8) <i>Neville v. Wilkinson</i> , 1 Bro. C. C. 543. |

to cut timber upon leave given by the jointress, the remainderman will be restrained from bringing any action of waste against the jointress (1).

12. Although a plaintiff has been guilty of a misrepresentation, yet if the defendant has been equally guilty of misrepresentation, one misrepresentation will be set off against the other, and a Court of Equity will restrain an action by the defendant in respect of the matter in which the mutual misrepresentations were made (2).

13. If a person is guilty of fraud by reason of concealment, which concealment is the means of his obtaining an advantage over another person, for instance, a covenant where he is not entitled to one, that is sufficient to disentitle him to enforce the covenant (3). Knowledge and non-communication of a fact which may influence the other party are not sufficient to rescind a contract, the fact must be, and be known by him who keeps it back to be, of sufficient importance to form a substantial element in the transaction, or there must be some active misrepresentation (4).

14. It has become the invariable practice, when any act involving breach of trust is intended to be done, though not in its consequences irremediable, as, for instance, where trustees contract to sell without proper care, or in a way which the parties interested consider inconsistent with the trust, to apply to a Court of Equity to prevent the trustees from selling (5). It is a principle of a Court of Equity that a trustee shall not be permitted to use the powers which the trust may confer upon him at Law, except for the legitimate purposes of his trust; and the Court will restrain him from doing so, and that although the plaintiff may have a remedy at Law (6). Time affords no sanction to establish breaches of trust, and a Court of Equity will restrain the commission of acts in violation of a trust (7).

Breach of
trust, Trusts,
Trustees.

15. A Court of Equity will set aside an appointment of trustees,

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| (1) <i>Aston v. Aston</i> , 1 Ves. Sen. 396. | (5) <i>Att.-Gen. v. Mayor of Liverpool</i> , |
| (2) <i>Greenfield v. Edwards</i> , 11 L. T. (N. S.) 663. | 1 My. & Cr. 171, 210. |
| (3) <i>Williamson v. Moriarty</i> , 19 W. R. 818. | (6) <i>Balls v. Strutt</i> , 1 Hare, 146. |
| (4) <i>Thompson v. Lambert</i> , Ir. Rep. 2 Eq. 433; 17 W. R. 111. | (7) <i>Drummond v. Att.-Gen.</i> , 2 H. L. C. 837; <i>Att.-Gen. v. Drummond</i> , 1 D. & War. 353; and see 3 D. & War. 165; 1 Con. & L. 210; 2 Ib. 93. |

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which has been obtained from the donees of the power by parties, with the intention of committing a fraud upon the trust, and will restrain the new trustees from proceeding in ejectment to recover the trust premises (1).

16. A party who has acquired the outward insignia of ownership by virtue of a trust, will be restrained from taking advantage of that circumstance, and from excluding the owner from entering on the property and from selling the same (2).

17. The Court will restrain trustees having no power to sell, from doing so, with the consent of the adult beneficiaries, until it has been ascertained when it would be for the benefit of the persons interested, not *sui juris*, that the sale should take place (3).

18. If a party in the course of his employment by the plaintiff, has obtained, surreptitiously, copies of private professional memoranda, with the intention of using, or communicating, or publishing them, he will be restrained from so doing, on the ground of breach of trust and confidence (4).

19. A Court of Equity will not enforce the trusts of a voluntary deed made by a debtor in favour of creditors. The trusts being voluntary, the debtor may vary them as he pleases, and the Court will not restrain the execution of the trusts of subsequent deeds until those of the first deed have been satisfied (5).

20. A trustee is not answerable for an innocent mistake from which he gets no advantage, and a Court of Equity will restrain proceedings at Law grounded on such mistake (6).

21. A Court of Equity will restrain one of several *cestuis que trust* from proceeding to get possession of a fund produced from a sale of securities which have been purchased with an original trust fund, obtained from a trustee by the *cestuis que trust* with a view to investment by the *cestuis que trust* in those securities (7).

22. Equity will enjoin a party holding land in trust from

(1) *Newsome v. Flowers*, 30 Beav. 461. see Sim. 1, n., and S. C., 3 Sim. 14; *et vide Garrard v. Lauderdale* (Lord), 3 Sim. 1.

(2) *Eachus v. Moss*, 14 W. R. 327.

(3) *Wiles v. Gresham*, 17 Jur. 779.

(4) *Yovatt v. Winyard*, 1 Jac. & W. 394. P. C. 255.

394.

(7) *Hopkins v. Newton*, 9 L. J. (Ch.) 27.

(5) *Wallwyn v. Coutts*, 3 Mer. 707; (Ch.) 27.

parting with his control over it (1). So it will restrain a trustee from removing the trust funds beyond the reach of the Court (2).

23. Trustees of money for an unascertained class of individuals cannot be called upon to ascertain, at their own risk and expense, who is included in that class. Thus a party claiming to be one of a class of unsatisfied bondholders, will be restrained from proceeding at Law to recover a part of a sum deposited in trust for the bondholders, if they are an unascertained class (3).

24. No person who stands in the relation of special confidence to another, so as to acquire habitual influence over his mind, can accept any gift or benefit from the person who is under the dominion of that influence, unless a sufficient protection has been interposed against the exercise of such influence (4). If the relation proved to exist between a donee and a donor implies the exercise of dominion and influence by the donee over the mind of the donor, the donee must prove that voluntary gifts are the pure, voluntary, well-understood acts of the donor's mind (5).

Undue influence.

25. In cases of gifts made under the influence of a delusion, it makes no difference that the donee may himself be under the influence of the same delusion as that which led to making the gift by the donor; it is only necessary, in such a case, to shew that the gift was bestowed under the influence of a delusion (6).

26. Whenever a person obtains by voluntary donation a benefit from another, he is bound, if the transaction be questioned, to prove that the transaction was righteous, and that the donor voluntarily and deliberately did the act, knowing its nature and effect, and there must be no suppression of facts; and this rule is not confined to cases of attorney and client, parent and child, and other relationships, but is general (7).

(1) *Hun v. Freeman*, 1 Ham, 490 (Amr.)

(2) *Symons v. Reid*, 5 Jones, Eq. 327 (Amr.)

(3) *Hankey v. Morley*, 4 Jur. (N. S.) 234.

(4) *Nottidge v. Prince*, 2 Giff. 246; 29 L. J. (Ch.) 857.

(5) *Lyon v. Home*, L. R. 6 Eq. 655; 37 L. J. (Ch.) 674; 18 L. T. (N. S.)

451; 16 W. R. 824; *et vide Hatch v. Hatch*, 9 Ves. 292, 296; *Dent v. Bennett*, 4 My. & Cr. 269, 276; *Huguenin v. Baseley*, 14 Ves. 273.

(6) *Nottidge v. Prince*, 2 Giff. 246; 29 L. J. (Ch.) 857.

(7) *Cooke v. Lamotte*, *Lamotte v. Cook*, 15 Beav. 234; 21 L. J. (Ch.) 371.

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27. A party who claims the benefit of a transaction founded on a dealing with a person who is under the control and influence of another, is bound to shew that all was fair, and a full explanation given; that onus is cast on him, and there can be no confirmation of such a transaction unless there be a knowledge of its invalidity (1), and an absolute release from the undue influence by means of which the fraud was practised (2).

Parties *in pari delicto*, *Particeps criminis*.

28. Where both parties are *in delicto*, concurring in an illegal act, it does not always follow that they stand *in pari delicto*; for there may be, and often are, very different degrees in their guilt (3). One party may act under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age, so that his guilt may be far less in degree than that of his associate in the offence (4); and besides there may be a necessity of supporting the public interests or public policy in many cases, on the part of the Court itself, however reprehensible the acts of the parties may be (5). A Court of Equity is not positively bound to interfere in such cases by an active exertion of its powers; but it has a discretion on the subject, and may prescribe the terms of its interference; and he who seeks equity at its hands may well be required to do equity. And it is against conscience that the party should have full relief, and at the same time pocket the money loaned, which may have been granted at his own mere solicitation; that would make a Court of Equity an instrument of fraud (6). On the other hand, if such a lender come into a Court of Equity, seeking to enforce such a contract,

(1) *Kempson v. Ashbee*, 22 W. R. 871; 23 W. R. 38; L. R. 10 Ch. 15; 43 L. J. (Ch.) 689; 44 L. J. (Ch.) 195; 30 L. T. (N. S.) 749; 31 L. T. (N. S.) 525.

(2) *Moxon v. Payne*, 43 L. J. (Ch.) 240.

(3) *Smith v. Bromley*, Doug. 696; *Browning v. Morris*, Cowp. 790; *Osborne v. Williams*, 18 Ves. 379.

(4) *Bosanquet v. Dashwood*, Cas. t. Tal. 37, 40, 41; *Chesterfield v. Janssen*, 2 Ves. Sen. 156, 157; *Osborne v. Williams*, 18 Ves. 379.

(5) See *Woodhouse v. Meredith*, 1 Jac. & W. 224, 225; 1 Fonbl. Eq. b. 1, ch. 4, § 4, n. (y); *Bosanquet v. Dashwood*, Cas. t. Tal. 37, 40, 41; *Smith v. Bromley*, Doug. 696, n.; *Browning v. Morris*, Cowp. 790; *Morris v. McCulloch*, 2 Eden, 190, and note 193; Story, Comm. Equity Jurisprudence, vol. i. p. 224, 2nd Ed.

(6) *Scott v. Nesbit*, 2 Bro. C. C. 641; 2 Cox, 183; *Benfield v. Solomons*, 9 Ves. 84.

the Court will refuse any assistance and repudiate the contract (1). For if Equity should relieve such a lender who is plaintiff, it would be aiding a wrongdoer who was seeking to make the Court the means of carrying into effect a transaction manifestly wrong in itself (2). Upon these principles, if a borrower has paid money upon such a contract, Courts of Equity (and indeed Courts of Law also) (3) will assist him to recover back the excess paid beyond principal and a reasonable interest, but no further; for it is no just objection to say that he is *particeps criminis*, and that *volenti non fit injuria*. It would be absurd to apply the latter maxim to the case of a man who, from mere necessity, pays more than the other can in justice demand, and who has been significantly called the slave of the lender. He can in no just sense be said to pay voluntarily; and as to being *particeps criminis*, he stands *in vinculis*, and is compelled to submit to the terms which oppression and his necessities impose on him; nor can it be said, in any case of oppression, that the party oppressed is *particeps criminis*, since it is that which he labours under, and which is imposed upon him by another, that makes the crime (4).

29. The jurisdiction of the Court of Chancery over unconscionable bargains and unfair dealing in obtaining exorbitant rates of interest, is not affected by the repeal of the usury laws by the 17 & 18 Vict. c. 90, nor by the 31 & 32 Vict. c. 4, as to dealings with reversionary interests. The Legislature has not repealed the doctrines of a Court of Equity, by which protection is thrown round unwary young men in the hands of unscrupulous persons ready to take advantage of their necessities (5). The doctrines of

Unconscionable bargains.

(1) 1 Fonbl. Eq. b. 1, ch. 1, § 3, n. (h); *Fanning v. Dunham*, 5 John. Ch. R. 142, 143, 144.

(2) 1 Fonbl. Eq. b. 1, ch. 1, § 3, n. (h); 1b. b. 1, ch. 4, § 7, and n. (k); Story, Equity Jurisprudence, vol. i. p. 244, 2nd Ed.

(3) 1 Fonbl. Eq. b. i. ch. 4, § 7, and n. (k); *Smith v. Bromley*, Doug. 696, n.; *Browning v. Morris*, Cowp. 292; *Bond v. Hays*, Ex'r., 12 Mass. R. 34; Story, *supra*.

(4) *Bosanquet v. Dashwood*, Cas. t. Tal. 39, 41; *Rawden v. Shadwell*,

Amb. 269; *Holbrook v. Sharpey*, 19 Ves. 131; Story, Comm., Equity Jurisprudence, vol. i. p. 245, 2nd Ed.

(5) *Tyler v. Yates*, L. R. 6 Ch. 665, 669; 19 W. R. 118, 909; L. R. 11 Eq. 265; 40 L. J. (Ch.) 768; 23 L. T. (N. S.) 447; 25 L. T. (N. S.) 284; 19 W. R. 909; *Chapple v. Mahon*, Ir. R. 5 Eq. 225; *Miller v. Cook*, L. R. 10 Eq. 641; 18 W. R. 1061; 22 L. T. (N. S.) 740; 40 L. J. (Ch.) 11; *Howley v. Cook*, 8 Ir. R. Eq. 571; *Beynon v. Cook*, L. R. 10 Ch. 389; 23 W. R. 413, 531.

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Equity as to the relief of expectant heirs from unconscionable bargains have not been affected by those Acts. The changes in the Law made by those Acts have in no degree whatever altered the *onus probandi* in those cases, which raise, from the circumstances or conditions of the parties contracting—weakness on one side, extortion on the other; or advantage taken of that weakness—a presumption of fraud (1). And this doctrine applies to all remaindermen and reversioners, and every one who has the hope of succession to property, either by descent or an expectation of a devise or bequest (2). The Court will not permit a money-lender who, by advertising loans on easy terms, entraps a person into borrowing, afterwards to charge exorbitant ones; the Court will bind him to his contract, and restrain him from attempting to realise his security, and direct it to stand only as a security for a reasonable rate of interest (3).

SECT. 6. *Public Bodies—Public Interests—Public Policy.*

Public bodies.

1. A Court of Equity has no jurisdiction to interfere by injunction, at the suit of the Attorney-General, with a public body in the exercise of the powers conferred on them by the Legislature, to perform acts in the manner they may deem advantageous to the public, upon any ground arising out of the balance of convenience and inconvenience, unless, perhaps, it could be shewn that such acts would be entirely useless (4).

2. If a public body, which has power given it by a statute for the performance of a particular object, exercises its power so as to injure the property of others, it is responsible for the injury, unless the act done is absolutely necessary for the performance of the object of the statute, and the Court will exercise its jurisdic-

(1) *Aylesbury (Earl) v. Morris*, L. R. 8 Ch. 484, 490; 42 L. J. (Ch.) 546, 146; 21 W. R. 424, 188; 28 L. T. (N. S.) 541; 27 L. T. (N. S.) 753.

(2) *Beynon v. Cook*, L. R. 10 Ch. 389; 23 W. R. 413, 531; 32 L. T. (N. S.) 353.

(3) *Helsham v. Barnett*, 21 W. R. 309.

(4) *Att.-Gen. v. Conservators of the River Thames, City of London Brewery Co. v. Same, Clothworkers' Co. v. Same, Thornton v. Same*, 1 H. & M. 1; 8 Jur. (N. S.) 1203; 11 W. R. 163.

tion by granting an injunction to restrain the injury, as, for instance, the commission of a nuisance (1).

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3. It is no defence, as against the rights of an individual, that a breach of an injunction has been incurred in behalf of public interests, and in carrying out duties imposed by an Act of Parliament (2). If all parties to a suit represent the public, and their real objects are in common, and no danger is threatened to the public, a Court of Equity will not grant an injunction (3).

Public in-
terests.

4. A Court of Equity will restrain proceedings at Law upon securities given for the purchase of an office of a public nature, upon the public policy of the Law, although the office may not be within the statute 5 & 6 Edw. 6. And so of securities given, where the parties are private persons, where the practice is publicly detrimental, as in the case of marriage brocage bonds (4). But if a legal right exist, the Court cannot refuse to interfere for its protection, upon grounds which depend on considerations of national policy; it is for the Legislature, and not for Courts of Justice, to deal with questions of national policy; the duty of a judge is to administer the law and not to make it (5).

Public policy.

SECT. 7. *Discovery.*

1. A Court of Equity will not allow a contest on a motion for an injunction to restrain an action until full discovery is given (6). And it would seem that in a bill of discovery in aid of an action a *primâ facie* case must be shewn (7).

2. If a plaintiff, in a bill for discovery in aid of an action at law by him, make out such a case as affords a reasonable ground

(1) *Att.-Gen. v. Colney Hatch Lunatic Asylum*, L. R. 4 Ch. 146; 38 L. J. (Ch.) 265; 17 W. R. 240; 19 L. T. (N. S.) 708; *Spokes v. Banbury Local Board of Health*, 11 Jur. (N. S.) 1010.

(2) *Spokes v. Banbury Local Board of Health*, 35 L. J. (Ch.) 105; 11 Jur. (N. S.) 1010.

(3) *Felkin v. Herbert* (Lord), 9 W. R. 496.

(4) *Harrington v. Du Chatel*, 1 Bro. C. C. 124.

(5) *Caldwell v. Vanvliessen*, 9 Hare, 415.

(6) *Harris v. Collett*, 26 Beav. 222.

(7) *Ib.*

for argument in a Court of Law, he will be entitled to the discovery and an injunction to restrain the defendant at Law from taking advantage of default in going to trial by the plaintiff (1).

SECT. 8. *Restraining Actions.*

1. It has never been the course of a Court of Equity to restrain an action merely because the plaintiff at Law cannot make out his case (2).

2. The Court of Chancery exercises a discretion in permitting actions to proceed, but it will never permit its decisions to be questioned in a Court of Law (3).

3. On an interlocutory application to stay an action, the plaintiff's equity must be clearly established, or he must pay the money in question into Court; therefore if the equity rest on an alleged parol agreement, which is denied by the defendant, and the plaintiff decline to pay the money into Court, the action will not be stayed (4).

4. If the Court of Common Law has clearly jurisdiction, a Court of Equity will not restrain an action; such a Court only interferes where there are equitable circumstances which render it unjust, as against the defendant at Law, that the action should go on (5). But such a Court has no jurisdiction, on the ground that a Court of Law is miscarrying, or an Act of Parliament absurd (6).

5. If a plaintiff come into Equity, claiming equitable rights under an instrument—for instance, a policy—and alleging that he has no rights at Common Law, the instrument being void at Law, he thereby puts his legal rights under the control of the Court of Equity, and that Court will restrain an action commenced upon the instrument after his bill in Equity has been dismissed. When a plaintiff comes into Equity in such a case, he submits his whole case to the jurisdiction of the Court to which he so applies (7).

(1) *Thomas v. Tyler*, 3 Y. & C. 255;
8 L. J. (N. S.) Ex. Eq. 4.

(2) *Mangles v. Grand Collier Dock Co.*, 10 Sim. 519; 9 L. J. (N. S.) Ch. 177; 4 Jur. 333.

(3) *Walker v. Micklethwait*, 1 Dr. & Sm. 49.

(4) *Greech v. Crain*, 39 L. J. (Ch.) 126.

(5) *Portsmouth (Earl of) v. Partridge*, 8 W. R. 658.

(6) *Ib.*

(7) *Tredegar v. Windus*, L. R. 19 Eq. 607, 612; 44 L. J. (Ch.) 268; 32 L. T. (N. S.) 596; 23 W. R. 511.

SECT. 9. *Convenience or Inconvenience of Interfering by Injunction*
—Interlocutory Applications for Injunctions, Interim Orders—
Mandatory Injunctions.

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1. If more inconvenience would arise from the interference of the Court than from its abstaining from interference, it will not grant an injunction (1). Upon an application for interim interference, it is a question whether, on a balance of convenience to the one party or to the other, it is or is not expedient (2). Where the opinion of the Court is not clearly for or against a plaintiff, and there is no danger of irreparable or very serious mischief, it will be governed by the balance of inconvenience, in granting or refusing an injunction (3). If an injunction would inflict great injury on a defendant, and a delay in granting it would cause little or no loss to the plaintiff, the Court will not grant it on an interlocutory application (4). Where the stoppage of buildings in course of construction, on the ground that they would materially obstruct the access of light to ancient windows, will manifestly occasion serious loss to one side largely in excess of any inconvenience which could be caused to the other side by their temporary progress, the Court will not grant an interlocutory injunction to restrain the erection of the buildings (5). Although it is difficult to determine what is the best mode of keeping matters *in statu quo* until the question of infringement is finally decided at the hearing of the action, and the Court will not ordinarily stop a going trade, or do anything in which there would be difficulty in giving compensation to one side or the other, yet if the Court is satisfied that merely to put a defendant on terms of keeping an account might be a clumsy and inefficient mode of recompensing the plaintiff, if the plaintiff should turn out to be right, it will grant an interim injunction to restrain the manufacture or sale of an article said to be an infringement of a patent,

Convenience or inconvenience of interfering by injunction.

(1) *Hodgson v. Powis (Earl)*, 1 De G. M. & G. 6; 12 Beav. 392, 529.

(2) *Shrewsbury and Chester Railw. Co. v. Shrewsbury and Birmingham Rail. Co.* 1 Sim. (N. S.) 410; 20 L. J. (N. S.) Ch. 574; 15 Jur. 548.

(3) *Cory v. Yarmouth and Norwich Railw. Co.*, 3 Hare, 693.

(4) *Wells v. Attenborough*, 19 W. R. 465; 24 L. T. (N. S.) 312.

(5) *Mackey v. Scottish Widows Fund Assurance Society*, 1r. R. 10 Eq. 113.

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putting the plaintiff to abide by any order as to damages should he turn out to be in the wrong; the more so, it would seem, where the trade is new, and the defendant is likely to have many customers, against whom, if the injunction were refused, the plaintiff, if in the right, would be forced to commence a multitude of suits; but if the defendant is an old seller, the Court will, it would seem, act the other way, as the granting an injunction would be too great a hardship upon him (1). The right of the Court to interfere by injunction not merely to restrain parties from doing acts, but also from entering into contracts pending litigation that might embarrass the plaintiff in his suit, must be guided by a discretion not to exercise it, where it sees that, on the balance of convenience and inconvenience between interim interference and non-interim interference, the balance greatly preponderates in favour of the defendant, and against the plaintiff (2). If the rights of a party are doubtful, the Court will act on the consideration of the comparative injury which may arise from granting or withholding an injunction (3). In granting an injunction the Court is bound to consider the amount of injury which may be thereby inflicted on strangers to the suit and third parties (4).

Interlocutory
applications
for injunc-
tions, interim
orders.

2. A Court of Equity will, where the necessity of the case requires it, interfere by injunction, during litigation, not only to preserve property *in statu quo*, but sometimes also, to prevent the defendant from affecting it by contracts or conveyances or other acts; but this latter interference is by no means a matter of course (5). When the Court is called on to interfere to preserve property *pendente lite*, it is apprehended there are two points on which the Court must satisfy itself. First, it must satisfy itself, not that the plaintiff has certainly a right, but that he has a fair question to raise as to the existence of such a right (6); and it is

(1) *Plimpton v. Spiller*, 25 W. R. 152.

(2) *Shrewsbury and Chester Railw. Co. v. Shrewsbury v. Birmingham Railw. Co.*, 1 Sim. (N. S.) 410; 20 L. J. (N. S.) Ch. 574; 15 Jur. 548.

(3) *Garrett v. Banstead and Epsom Downs Rail. Co.*, 13 W. R. 878; 11 Jur. (N. S.) 591.

(4) *Maythorn v. Palmer*, 13 W. R. 37; 11 Jur. (N. S.) 230; 11 L. T. (N. S.) 261.

(5) *Shrewsbury and Chester Railw. Co. v. Shrewsbury and Birmingham Railw. Co. &c.*, ante; et vide *Spiller v. Spiller*, 3 Swan. 556.

(6) 1b.; et vide *Great Western Railw. Co. v. Birmingham and Oxford Junction Railw. Co.*, 2 1hil. 597, 602, 603.

conceived that even where it is made out that there is a point to be decided which the plaintiff is fairly raising, still there is a further and second question, namely, whether interim interference on a balance of convenience and inconvenience to the one party and to the other, is or is not expedient. Where the alternative is interference or probable destruction of the property, there, of course, the Court will be very ready to lend its immediate assistance, even at considerable risk that it may be encroaching on what may eventually turn out to be a legal right of the defendant. But when, on the other hand, the only evil to result from non-interference is that the plaintiff may, by the contracts or deeds of the defendant, be retarded or embarrassed in his litigation, there the Court will be far more ready to listen to any suggestion of the defendant shewing that interference during litigation will prejudice his rights (1).

3. Upon interlocutory applications, the Court will have regard to the balance of mischief likely to result from interfering or refusing to interfere (2). But there is no limit to the practice of a Court of Equity with regard to interlocutory applications, so far as they are necessary and reasonable applications ancillary to the due performance of its functions, namely, the administration of justice at the hearing of the cause. Whether they are or are not to be granted must, of course, depend upon the special circumstances of the case (3). The Court will not, upon interlocutory motion, restrain a small excess in the height of a building, in violation of a contract or an Act of Parliament, where no irreparable injury arises from such excess (4). The Court will not, by an interlocutory injunction restrain an act the validity of which, as between the parties to the suit, is matter of doubt, and for which, if wrongful, the plaintiff can obtain adequate compensation in damages at the hearing of the cause, while the injunction, if granted, would inflict serious injury on the party sought to be

(1) *Shrewsbury and Chester Railw. Co. v. Shrewsbury and Birmingham Railw. Co.*, 1 Sim. (N. S.) 410; 20 L. J. (N. S.) Ch. 574; 15 Jur. 548.

(2) *Fielden v. Lancashire and Yorkshire Railw. Co.*, 2 De G. & Sm. 531.

(3) *Smith v. Peters*, L. R. 20 Eq. 511, 513.

(4) *Warden, &c., of Dover Harbour v. South Eastern Railw. Co.*, 9 Hare, 493.

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restrained. A Court of Equity, on an interlocutory motion for an injunction, acts according to the justice of the case, as ascertained upon the evidence before it, and according to the comparative injury which may arise from granting or withholding the injunction (1). If the Court considers that a party will not be damnified by the proceedings sought to be restrained remaining *in statu quo* until the hearing of the cause, it will not grant an interlocutory injunction where the principal part of the arrangement sought to be restrained has been carried out (2). If the Court cannot compel a defendant—either a company or an individual—to do that which is necessary to enable a plaintiff to take advantage of an injunction restraining the defendant from doing an act, it will not grant either an interlocutory or final injunction, since it would be inoperative (3). Thus, if the act which is necessary, is continuous, it is not the practice of the Court to compel by injunction either a company or an individual to do such an act—for instance, one that requires the continuous employment of people (4). An injunction *pendente lite* should not be granted on light grounds, but in such cases should await the full proof upon the final hearing (5). It is a matter of discretion for a Court of Equity whether it will or not interfere by interim order respecting the property of a litigant. If the property is *in medio* (in the actual enjoyment of no one), the Court will interfere for the benefit of all concerned (6). On an interlocutory motion for an injunction as to a matter merely pecuniary, the plaintiff cannot succeed without satisfying the Court not merely that there is a case to be tried, but that there is some probability of the bill not being dismissed at the hearing (7). The leading principle which ought, generally speaking, to be the guide of the Court, and to limit its discretion in granting inter-

(1) *Munro v. Wivenhoe and Brightlingsea Railw. Co.*, 11 Jur. (N. S.) 612; 13 W. R. 880; 4 De G. J. & S. 723.

(2) *Bishop v. Scott*, 7 L. T. (N. S.) 570.

(3) *The Powell Duffryn Steam Coal Co. v. The Taff Vale Railw. Co.*, L. R. 9 Ch. 331, 335; 20 W. R. 460; 22 W. R. 182; 26 L. T. (N. S.) 357;

43 L. J. (Ch.) 575; 29 L. T. (N. S.) 575; 30 L. T. (N. S.) 208.

(4) *Ib.*

(5) *Redfield v. Middleton*, 7 Bosw. 649 (Amr.).

(6) *Owen v. Homan*, 4 H. L. C. 997; 17 Jur. (N. S.) 861.

(7) *Att.-Gen. v. Wigan (Mayor of)*, 5 De G. M. & G. 52; 18 Jur. 299; 23 L. J. (Ch.) 429.

locutory injunctions, at least where no very special circumstances occur, is that only such a restraint should be imposed as may suffice to stop the mischief complained of; and where it is to stay further injury, to keep things as they are for the present (1). But in matters of great importance, which can only be properly determined at the hearing, the Court is in favour of restraining destructive operations until the hearing (2). Before the Court of Chancery interposes upon an interlocutory application to stay proceedings in a suit by reason of a decree or judgment in a foreign country, it must be satisfied that the foreign decree or judgment does justice and covers the whole subject of the suit (3).

4. Though the small extent of a plaintiff's interest, for instance, a tenancy from year to year, where a notice to quit has been given, does not necessarily disentitle him to relief, yet it is a material ingredient for consideration, and if it is not clear that a plaintiff having a slender interest has sustained material injury, and the inconvenience to the defendant caused by a mandatory injunction is far greater than the refusal of it to the plaintiff, he being left to his action for damages, the Court will refuse the injunction (4). The jurisdiction of the Court to interfere by way of mandatory injunction should be exercised with the greatest possible caution, and it would seem should be confined to cases where the injury cannot be estimated and sufficiently compensated by a pecuniary payment (5). In order to obtain a mandatory injunction, the right, to restrain the violation of which, the injunction is asked for, must be clearly made out; also that there is a present want to use that right, with which the obstruction complained of is an interference (6). The Court is always very reluctant upon interlocutory applications to grant a mandatory injunction (7). Although the Court will not interfere by way of

Mandatory
injunctions.

(1) *Blakemore v. Glamorganshire Canal Navigation Co.*, 1 My. & K. 154, 185. 529; 32 L. J. (Ch.) 601; 3 De G. J. & S. 533.

(2) *Att.-Gen. v. Great Eastern Railw. Co.*, 25 L. T. (N. S.) 867. (5) *Isenberg v. East India House Estate Co.*, 3 De G. J. & F. 263; 10 Jur. (N.S.) 221; 33 L. J. (Ch.) 392;

(3) *Astell v. Le Page*, 2 De G. M. & G. 892. 9 L. T. (N. S.) 625; 12 W. R. 450.

(4) *Jacomb v. Knight*, 9 Jur. (N. S.) (6) *Bradburn v. Morris*, *Morris v. Bradburn*, 3 Ch. D. 812.

(7) *Turner v. Spooner*, 1 Dr. & Sm. 467; 30 L. J. (Ch.) 801.

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mandatory injunction except in cases in which extreme, or, at all events, very serious damage would ensue from its interference being withheld; yet the Court has no general rule against granting such relief where the damage has been completed before filing of the bill; every case must depend upon its own circumstances (1) (2). And there is no doubt that the Court has power to interfere, in cases where the damage has been completed before the filing of the bill, upon an interlocutory motion for a mandatory injunction; for instance, where there has been a clear violation of an express contract after express notice that the violation would not be sanctioned (3).

5. The Court has power to restrain a party from allowing a thing to continue; such an injunction as this has the effect of making the party take some active measures, and this is a species of negative injunction (4). Although a covenant be one of which the Court cannot decree specific performance, yet it can grant an injunction restraining a defendant from continuing to violate his covenant and obligation (5).

SECT. 10. *Generally.*

1. Where a plaintiff alleges and proves, in a case for an injunction, a peculiar and specific injury, the order which he obtains gives him an extended right in general terms to restrain any injury of the same kind; but where the peculiar and specific

(1) *Durell v. Pritchard*, L. R. 1 Ch. 244, 250.

(2) In the case of *Smith v. Smith*, (L. R. 20 Eq. 500; 23 W. R. 771; 32 L. T. (N. S.) 787; 44 L. J. (Ch.) 630), the Master of the Rolls, Sir George Jessel, dissents from the proposition entertained by the Courts that extra caution is to be exercised in granting a mandatory injunction, and says that in looking at the reason of the thing there is not any pretence for such a distinction as is supposed to exist between that and other forms of in-

junctions; however, it is submitted that having respect to the law on this subject, as laid down in the cases, these observations are not consistent with that law, and must be received with great caution.

(3) *Morris v. Grant*, 24 W. R. 55, 56.

(4) *Spencer v. London and Birmingham Railw. Co.*, 8 Sim. 183, 198; *Hankin v. Huskisson*, 4 Sim. 13.

(5) *Cooke v. Chilcott*, L. R. 3 Ch. D. 694; 34 L. T. 207.

injury is distinctly stated upon the pleadings, and where the words used describe another peculiar and specific injury proposed to be proved, the plaintiff is not entitled to relief (1). If a bill state that an injury by the defendant will, by a certain mode of operation, be inflicted upon the plaintiff, and then after giving notice of motion for an injunction, that mode of operation is changed and another adopted, the wholesome arrangement is to amend the bill; and general words in a motion for an injunction are only justified by establishing a specific case of injury (2). If an injunction is applied for upon a distinct ground which fails, it will not, in general, be granted upon another ground which has not been put forward, but which it appears might have been put forward in the circumstances of the case (3). To warrant the Court in granting or continuing an injunction, it must be reasonably satisfied that there is an intention on the part of the defendant to do the acts sought to be restrained, or, at least, that there is probable ground for believing that, unless the injunction is granted, there is danger of such acts being done, and it is not a sufficient ground for granting an injunction that, if there is no such intention, it will do the defendant no harm (4). If no irreparable injury is shewn, and the title of the plaintiff is not sufficiently set out in the bill, and no act of ownership is proved to support an allegation of possession and enjoyment, the Court will not grant an injunction (5). In order to obtain an injunction, a plaintiff who complains, not that an act is an actual violation of his right, but that a threatened or intended act, if carried into effect, will be a violation of the right, must shew that such will be an inevitable result. It will not do to say that a violation of the right may be the result; the plaintiff must shew that a violation will be the inevitable result (6).

2. A plaintiff is entitled to an injunction to preserve property until a custodian can be obtained (7).

(1) *Herz v. Union Bank of London*,
1 Jur. (N. S.) 127.

(2) *Ib.*

(3) *Castelli v. Cook*, 7 Hare, 89.

(4) *Dunn v. Bryan*, 7 Ir. R. Eq.
143.

(5) *Southampton (Lord) v. Bir-*
mingham Railw. Co., 2 Jur. 1012.

(6) *Pattison v. Gilford*, L. R. 18
Eq. 256, 263; 22 W. R. 673; 43 L. J.
(Ch.) 524.

(7) *Barry v. Donnellan*, 1 Hog. 339.

3. It is not necessary for a party who seeks to continue an injunction to the hearing, to shew an indefeasible right to the decree prayed by the bill (1).

4. A party is entitled to move to dissolve an injunction if, from ambiguity in its terms, he may, under any construction of the order, be prejudicially affected (2). It is the duty of a party asking for an injunction, to bring under the notice of the Court all facts material to the determination of his right to that injunction, and it is no excuse for him to say that he was not aware of the importance of any facts which he omits to bring forward; and if a plaintiff obtain an *ex parte* injunction on the facts stated in the bill, but other facts came out in the defendant's answer, raising a question of law on which the right of the plaintiff to an injunction depends, the omission of the plaintiff to bring the facts under the notice of the Court is of itself a sufficient ground for dissolving the injunction (3). The plaintiff must fully and fairly state his case in the first instance (4). A misstatement of his case, arising from his mistake, is a ground for dissolving an injunction (5). It is an established rule that where a party comes for an *ex parte* injunction, and misrepresents the facts of the case, he shall not then be permitted to support the injunction by shewing another state of circumstances in which he would be entitled to it; because the jurisdiction of the Court in granting *ex parte* injunctions is obviously a very hazardous one, and one which, though often used to preserve property, may be often used to the injury of others, and it is right that a strict hand should be held over those who come with such applications (6). The Court exercises a wide discretion as to keeping up or dissolving injunctions. Thus if a plaintiff, who has obtained an injunction, become insolvent, and the suit be retarded by delay in appointing an assignee, the Court will direct the plaintiff in a supplemental suit to set the cause down forthwith, notwithstanding he is entitled to bring the cause regularly to hearing (7).

(1) *Powell v. Lloyd*, 2 Y. & J. 427. 183; 2 Con. & L. 76.

(2) *Dalglisch v. Jarvie*, 2 Mac. & G. 231; 2 H. & T. 437.

(3) *Ib.*

(4) *Dease v. Plunkett*, Dr. 225; *Hemphill v. M'Kenna*, 2 D. & War.

(5) *Vandergucht v. De Blaquièrre*, 8 Sim. 315, 323.

(6) *Att.-Gen. v. Liverpool (Mayor, &c.)*, 1 My. & Cr. 171, 210.

(7) *Caird v. Campbell*, 1 Moll. 484.

5. The jurisdiction of the Court to restrain by injunction an act which the defendant is by contract bound to abstain from, is not confined to cases in which there are either no other executory terms in the contract, or none which a Court of Equity has not the means of enforcing. If a bill states a right or title in the plaintiff to the benefit of a negative agreement on the part of the defendant, or of his abstaining from a given act, the Court will equally interfere by injunction, whether the right be at Law or under an agreement which cannot be otherwise brought under its jurisdiction (1).

6. The Court will grant an injunction to restrain one of the defendants to a bill from parting with the property in question in the cause (the property being in this country), notwithstanding the principal party interested (another of the defendants) is out of the jurisdiction (2).

7. If a plaintiff state upon his bill a case entitling him to relief, and the defendant protect himself from answering several of the circumstances which are essential to the plaintiff's equity, on the ground that the discovery of them would expose him to pains and censures, but admit other circumstances connected with these; if the Court, comparing what is admitted with what is refused to be answered, see reason to think that the case is one which is fit for inquiry in Equity, an injunction will be granted (3).

8. The Court has an equitable jurisdiction to grant an injunction, or to order the delivery up of an instrument, though it may be, at the time of the motion, the subject of an action then going on (4). And this although there may be a good defence at Law (5).

9. Money paid into Court upon an injunction, and laid out, is a security, and not a payment; and therefore if it turns out that less is due to the defendant than the amount paid in, the balance will be restored to the plaintiff (6).

(1) *Dietrichsen v. Cabburn*, 2 Ph. 52; 1 Coop. C. C. 72.

(2) *Malcolm v. Scott*, 3 Hare, 39.

(3) — *v. Donovan*, 2 L. J. (Ch.) 56.

(4) *Jervis v. White*, 7 Ves. 413.

(5) *Hodgson v. Murray*, 2 Sim. 515, 283; *Stuckhouse v. Countess of Jersey*, 1 J. & H. 721, 731.

(6) *Broughton v. Pitchford*, 6 Madd. 295.

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10. A Court of Equity will not grant an injunction where the proper remedy is a mandamus (1); and although the injunction is asked for at a period when a mandamus cannot be obtained for some months, that is not a sufficient reason for granting the injunction (2).

(1) *Att.-Gen. v. Birmingham & Oxford Junction Railw. Co.*, 4 De G. & Sm. 490; 3 Mac. & G. 453; 15 Jur. 1024; 16 Jur. 113.

(2) *Ib.*

PART II.

THE DOCTRINES AND PRINCIPLES OF THE LAW OF INJUNCTIONS,
AS APPLICABLE TO THE VARIOUS SUBJECTS OF INJUNCTIONS,
WHERE IT IS NOT NECESSARY TO RESTRAIN PROCEEDINGS IN
COURTS OF LAW AND OTHER COURTS.

CHAPTER I.

THE DOCTRINES AND PRINCIPLES AS APPLICABLE TO REAL PRO-
PERTY (INCLUDING THEREIN CHATTELS REAL OR LEASEHOLDS).

SECT. 1. *Distress, Rent.*

1. Where there are other jurisdictions perfectly competent to prevent annoyance to property by a mere stranger, a Court of Equity has no jurisdiction, and will not, at the suit of an owner of property, interfere to restrain such mere stranger from vexatiously distraining on or otherwise molesting the tenant for rent (1); nor will such a Court, where there is nothing more than a succession of legal rights, which must be determined in a Court of Law, direct an account to be taken of the rents which have been received by a stranger, or grant an injunction to restrain him from receiving future rents (2).

SECT. 2. *Possession, Trespass.*

1. The following rules are those upon which a Court of Equity acts, in the different circumstances of a defendant or a plaintiff

(1) *Best v. Drake*, 11 Hare, 369; *Att.-Gen. v. Sheffield Gas Consumers*
Drake v. West, 22 L. J. (Ch.) 375; *Co.*, 3 De G. M. & G. 304.
Aldis v. Fraser, 15 Beav. 215; *et vide* (2) *Aldis v. Fraser*, 15 Beav. 215.

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being in possession, where recourse is had to such a Court to restrain acts of spoliation. If a defendant is in possession of an estate, and a plaintiff claiming possession seeks to restrain him from acts of spoliation, the Court will not grant an injunction unless the acts are so flagrant as to justify it in departing from the general rule not to interfere. If a plaintiff is in possession, and they are the acts of a stranger, the tendency of the Court is not to grant an injunction, and to leave him to his remedy at Law against such stranger committing such acts, unless there are special circumstances, or they tend to the destruction of the inheritance. But if a plaintiff is in possession, and seeks to restrain the defendant claiming title, the tendency of the Court is to grant the injunction, unless there are special reasons why it should not, at least where acts do or may tend to the destruction or injury of the estate, and it would seem, the tendency of modern decisions, continually increasing from year to year, is to break down the old distinctions between waste and trespass (1) (2). Where there is a deliberate and unlawful invasion by one man of another man's land for the purpose of a continuing trespass, which is in law a series of trespasses from time to time, to the gain and profit of the trespasser, without the consent of the owner of the land; it is a proper subject for an injunction, and the owner of the soil will not be left to his remedy at Law, nor required to establish his right at Law; and the mere fact of the trespass being complete at the time the bill is filed will not prevent an injunction in the nature of a mandatory injunction, against the continuance of the trespass, if there has been neither acquiescence nor delay (3). And the owner in fee of a garden over which the tenants of his houses adjoining have rights of enjoyment and management, is entitled to

(1) *Loundes v. Bettle*, 10 Jur. (N.S.) 226; 12 W. R. 399; 33 L. J. (Ch.) (N.S.) 451; 10 L. T. (N.S.) 55.

(2) Under the Judicature Act, 1873, s. 25, clause 8, an injunction may be granted to prevent any threatened or apprehended waste or trespass, if the Court shall think fit, whether the person against whom such injunction is sought, is or is not in possession under

any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or by either of the parties are legal or equitable.

(3) *Goodson v. Richardson*, L. R. 9 Ch. 221; 22 W. R. 337; 43 L. J. (Ch.) 790; 30 L. T. (N.S.) 142.

an injunction to restrain continuing trespasses and nuisances in the garden, by a person acting under the colour of a contract to improve the garden entered into between him and the tenants (1). Pending a partition suit, the Court will not interfere with the property, nor allow it to be interfered with by the parties, until the partition has been completed; and, therefore, it will not restrain the defendant in the suit, who is in occupation of the portion allotted to the plaintiff, from proceeding with an action of trespass against the plaintiff for a forcible entry (2).

SECT. 3. *Water, Rivers—Wells—Canals—Ferries.*

1. A riparian owner on a tidal navigable river, retains, in addition to the right of navigation to which he is entitled as one of the public, his rights as an ordinary riparian owner, underlying and controlled by, but not extinguished by, the public right of navigation. Among such private riparian rights as an ordinary riparian owner, is that of an access to and from a particular wharf; this is not a right held in common with all the public, for the rest of the public have no access to or from the river at the particular place; it is a form of enjoyment of the land; and of the river in connection with the land, the disturbance of which may be vindicated in damages by an action or restrained by an injunction. It is a portion of the valuable enjoyment of the land, and any work taking it away is an injurious affecting of the land, that is to say, the occasioning to the land an *injuria*, or an infringement of right (3).

Water,
Rivers.

2. The soil of the *alveus* is not the common property of the respective owners on the opposite sides of a river; the share of each belongs to him in severalty, and extends *usque ad medium filum aquæ*; but neither is entitled to use it in such a manner as to interfere with the natural flow of the stream. A fence or

(1) *Allen v. Martin*, L. R. 20 Eq. 462; 23 W. R. 904; 32 L. T. (N. S.) 750.

(3) *Lyon v. The Fishmongers' Co.*, 25 W. R. 165; 23 W. R. 689; 44 L. J. (Ch.) 408; 31 L. T. 479.

(2) *Hughes v. D'Arcy*, 8 Ir. R. Eq. 71.

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bulwark on the bank is allowable, but the *alveus* is sacred, and any encroachment by one proprietor may be resisted by the other; the onus of proving that the act is not an encroachment falls on the party doing it, who is *primâ facie* held responsible; however, mere apprehension, without some show of injury, will not ground a complaint. An encroachment on the *alveus* of a running stream may be complained of by an adjacent or an *ex adverso* proprietor, without the necessity of proving either that damage has been sustained, or that it is likely to be sustained from that cause (1). No man has a right to put an obstruction in the bed of a public navigable river; and the Court will restrain the construction of erections which will create an obstruction to the navigation of such a river (2).

3. The right to the use of water rests on clear and settled principles. *Primâ facie*, the proprietor of each bank of a stream is the proprietor of half the land covered by the stream, but there is no property in the water. Every proprietor has an equal right to use the water which flows in the stream, and, consequently, no proprietor can have the right to use the water to the prejudice of any other proprietor without the consent of the other proprietors who may be affected by his operations; no proprietor can either diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back on the proprietors above. Every proprietor who claims a right, either to throw the water back above, or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or licence from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years (3). A riparian owner has a right, irrespective of

(1) *Bickett v. Morris*, L. R. 1 H. L., Sc. 47; *et vide Lord Advocate v. Hamilton*, 1 Macq. 46, for the distinction between rivers navigable and rivers not navigable, shewing that the soil of the *alveus* in rivers navigable is in the Crown; *Id.* n. 49.

(2) *Att.-Gen. v. Terry*, L. R. 9 Ch. 423; 22 W. R. 200, 395; 29 L. T. (N. S.) 716; 30 L. T. (N. S.) 215.

(3) *Wright v. Howard*, 1 S. & S. 203.

See the Prescription Act, 2 & 3 Will. 4 c. 71, s. 2, which gives a prescriptive right to the use of water by user for twenty years before a suit to protect the right, if an actual grant of the easement can be presumed to have been lawfully made. *Staffordshire and Worcestershire Canal Navigation Co. v. Birmingham Canal Navigation Co.*, L. R. 1 H. L. 254.

any actual damage sustained by him, to complain of an obstruction to a stream (1). A continuing diversion of water from its natural bed is an irreparable injury, which Equity will redress (2).

4. In order to establish a claim to use water there must be evidence of twenty years' user, and it must be shewn that there has not been an interruption for one year before filing a bill (3). A possession of less than twenty years will give no prescriptive right to the use of water (4). Where there is a prescriptive right to a riparian easement, the user which originated the right must also be its measure, and the easement cannot be enlarged to the prejudice of any other person (5). Thus, where a prescriptive right to foul a stream has been acquired, the fouling must not be considerably enlarged to the prejudice of other people, and the fact that the stream is fouled by others is not a defence to a suit to restrain the fouling by one. The mere suspension of the exercise of a prescriptive right is not sufficient to destroy the right without some evidence of an intention to abandon it; but actual disuser of an easement for twenty years, during which others have acquired adverse rights, destroys the right to the easement (6). But mere non-user for less than twenty years of a privilege or of an easement is not in itself a proof of abandonment; abandonment is a conclusion to be drawn from all the circumstances, amongst which the lying by and permitting others to incur expense in preparing to do that which, if continued uninterruptedly for twenty years, would destroy the easement, is a fact of great importance (7). The owner of land on the banks of a river can maintain a suit to restrain the fouling of the water of the river without shewing that the fouling is actually injurious to him (8).

(1) *Norbury (Earl) v. Kitchin*, 15 L. T. (N. S.) 501. 633; *vide Weeks v. Heward*, 10 W. R. 557.

(2) *Tuolumne Water Co. v. Chapman*, 8 Cal. 392; *Corning v. Troy, &c., Factory*, 39 Barb. 311 (Amr.). (5) *Crossley & Sons v. Lightowler*, L. R. 2 Ch. 478; 36 L. J. (Ch.) 584; 16 L. T. (N. S.) 438; L. R. 3 Eq. 279.

(3) *Ennor v. Barwell*, 1 De G. F. & J. 529; 2 Giff. 410; 4 L. T. (N. S.) 597; 6 Jur. (N. S.) 1233, 1283; 7 Jur. (N. S.) 788; 8 W. R. 300. (6) *Ib.* (7) *Ib.* L. R. 3 Eq. 279.

(4) *Ivimy v. Stocker*, 34 L. J. (Ch.) 3 Eq. 279. (8) *Ib.* L. R. 2 Ch. 478; 36 L. J. (Ch.) 584; 16 L. T. (N. S.) 438; L. R. 3 Eq. 279.

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Though a river is polluted before it receives the drainage of a town, the landowners on the banks are entitled to restrain the further pollution (1). An occupant of neighbouring land is not entitled to intercept the natural flow of water from surface springs not flowing through perfectly defined channels, which flow in his and neighbouring lands into another man's lands adjoining his, the occupant's land (2).

5. An owner of freehold lands and his lessee will be restrained from working mines in the lands under a watercourse in such a manner as to interfere with the flow and passage of the water, to a supply of which from the stream a plaintiff is entitled, in and along the watercourse (3); but although, if there is no actual damage sustained by the diversion and use of a stream, the Court will not restrain the diversion or use of the water (4), yet if an actual subsidence has taken place in the bed of a stream through the working of minerals lying under the bed, although the passage of the water has not been interfered with; yet a defendant will be required to give an undertaking not to work the minerals in such a way as to obstruct or interfere with the flow and passage of the water, to a supply of which the plaintiff is entitled (5).

6. The conditions required to induce a Court of Equity to grant an injunction to restrain the infringement of a right acquired by long user to use the water of a stream, are those following:—If parties have established a legal right to use the water of a stream for their works, and another person comes and erects works on the same stream, above their works, and by his manufacturing process so fouls the water of the stream as seriously and continuously to obstruct—that is to say, to set up a frequently recurring obstruction, it is not necessary that it should be a never-ceasing one—the effective carrying on of their manufacture; and if the granting of an injunction will restore, or tend to restore, those parties to the

(1) *Att.-Gen. v. Leeds Corporation*, 8 Jur. (N. S.) 1004; 31 L. J. (Ch.) L. R. 5 Ch. 583. 763.

(2) *Ennor v. Barwell*, 1 De G. F. & J. 529; 2 Giff. 410; 4 L. T. (N. S.) 597; 6 Jur. (N. S.) 1233, 1283; 7 Jur. (N. S.) 788; 8 W. R. 300. (4) *Elmhirst v. Spencer*, 2 Mac. & G. 45.

(5) *Elwell v. Crowther*, 31 Beav. 163; 8 Jur. (N. S.) 1004; 31 L. J. (Ch.) 763.

(3) *Elwell v. Crowther*, 31 Beav. 163; (Ch.) 763.

position in which they previously stood, and in which they have a right to stand; and if the injury complained of is of such a nature that damages will not be an adequate compensation, that is, such a compensation as will in effect, though not *in specie*, place them in the position in which they previously stood; and if, moreover, they use due diligence in vindicating their rights—they have in general a right to come to a Court of Equity and say: “Do not leave us to bring action after action for the purpose of recovering damages; but interfere with a strong hand and prevent the continuance of the acts we complain of, in order that our legal right may be protected and preserved to us.” But that right is only in general, because whenever a Court of Equity is asked for an injunction in cases of such a nature as this, it must have regard, not only to the dry strict rights of the plaintiff and defendant, but also to the surrounding circumstances; to the rights and interest of other persons which may be more or less involved, before it exercises its jurisdiction of granting an injunction. The mere dry fact of a plaintiff having an abstract right is not enough to justify a Court of Equity as a matter of course, on that right being established at Law, in granting an injunction, if the right be infringed ever so minutely. On the other hand, it is far from the fact that because in an action at Law the jury has given only a shilling or a farthing damages, that that is a ground for concluding that the injury is not serious, and that the case is one in which an injunction ought not to be granted (1). Although a landowner will not in general be restrained from drawing off the subterranean waters in the adjoining land, yet he will be restrained if in so doing he draws off the water flowing in a defined surface channel through the adjoining land (2).

7. Upon a severance of tenements held by one owner, easements of necessity, or continuous easements, will pass by implication of law without any words of grant; and, in such a case, the right to a flow of water along an artificial culvert or pipe from one man's property to that of another man is an easement as of necessity, and in its nature continuous, and it will consequently

(1) *Wood v. Sutcliffe*, 2 Sim. (N. S.) 163.

(2) *Grand Junction Canal Co. v. Shugar*, L. R. 6 Ch. 483; 19 W. R. 569.

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have passed by implication of law to the latter, when his property was conveyed to him, and he may use the water in any way he likes (1). Parties in possession of a foreshore, whether rightful or wrongful as against the Crown, are entitled to restrain a trespasser thereon (2). Pending proceedings at Law to try the right to a watercourse, parties will not be allowed to take the law into their own hands (3).

Wells.

8. When a well is supplied with water which percolates through the earth, and does not flow through any defined channel, although the owner of the well is not entitled to the water until it actually enters his well, the occupier of adjoining property will be restrained from using a cesspool therein in such a manner as to pollute the water coming through his property and supplying the well (4). But it is a question whether the owner of an old well can prevent his neighbour from sinking a well in his own land, on the ground that thereby the supply of water to the old well will be drawn off or diminished (5).

Canals.

9. Persons claiming to have acquired rights by prescription in the water of a canal, have to meet the difficulty that these waters have been devoted by the Legislature to a special purpose (6). The doctrine as to use of water in natural or artificial streams does not apply to water passing through locks in a canal, such water being accumulated under the authority of the Legislature, to be used in a particular manner for the benefit of the public (7). And the water passing through the lock of a canal does not constitute a watercourse within the Prescription Act (2 & 3 Will. 4, c. 71 s. 2) (8). Parties authorized by a Canal Act to take water from a canal for one purpose will not be allowed to take it for another (9). The pulling down a gate and wasteway of a canal

(1) *Watts v. Kelson*, 19 W. R. 338; L. R. 6 Ch. 166; 40 L. J. (Ch.) 126; 24 L. T. (N. S.) 209.

(2) *Hustings (Corporation of) v. Icell*, L. R. 19 Eq. 558, 585, *et vide* *Mulholland v. Killen*, 9 Ir. R. Eq. 471.

(3) *Dewhurst v. Wrigley*, C. P. C. 329.

(4) *Womersley v. Church*, 17 L. T. (N. S.) 191.

(5) *Hammond v. Hall*, 10 Sim. 551.

(6) *Staffordshire and Worcestershir. Canal Navigation Co. v. Birmingham Canals Navigation Co.*, 11 Jur. (N. S.) 71; 13 W. R. 130.

(7) S. C., L. R. 1 H. L. 254.

(8) *Ib.*

(9) *Rochdale Canal Co. v. King*, 16 Beav. 630; 17 Jur. 100; 22 L. J. (Ch.) 604; 2 Sim. (N. S.) 78; 20 L. J. (N. S.) (Ch.) 675; 15 Jur. 692.

company whose canal adjoins and is above any falls will be restrained (1).

10. A canal company which by its statutory powers has acquired the rights of a riparian proprietor in a stream (and a canal company having power under its Act to purchase and hold land is, in respect of land so purchased, though not necessarily for all other purposes, in the position of an individual riparian proprietor) may restrain any other riparian proprietor—for instance, a water-works company—above him from diverting the stream so as to cause it to flow otherwise than in its ordinary channel, without proving actual damage; subject, however, to this circumstance, that all streams are *publici juris*, and all water flowing down any stream is for the common use of mankind who live on the banks of the stream, for themselves, their families, and cattle, and all ordinary domestic purposes (2).

11. Persons authorized by Act of Parliament to cut a canal, if their funds are insufficient for completion of the undertaking, may, on the prompt application of the owner of lands through which they are cutting, be restrained from proceeding (3).

12. Although a Court of Equity will refuse to make an order specifically to repair the banks of a canal and stop gates and other works, yet it will grant an injunction to restrain a defendant from impeding a plaintiff from navigating and using the canal by continuing to keep the banks, &c., out of repair, and thus the effect of such an order to repair will be obtained (4).

13. A canal company will be restrained from pumping foul water into their canal so as to make the canal a nuisance, and it is no defence that the foulness was caused by other persons (5).

14. A mere understanding between the owner of a canal and plaintiffs that so long as the plaintiffs remained good customers of

(1) *The Society, &c. v. The Morris*, 24 W. R. 284; 45 L. J. (Ch.) 638; 33 &c., 2 Halst. Ch. 252; 1 Halst. Ch. L. T. (N. S.) 513.

(2) *Wilts and Berks Canal Navigation Co. v. Swindon Waterworks Co.*, 203 (Amr.).

(3) *Mayor, &c., of King's Lynn v. Pemberton*, 1 Sw. 244, 250.

(4) *Lane v. Newdegate*, 10 Ves. 192.

(5) *Att.-Gen. v. Bradford Navigation Co.*, 35 L. J. (Ch.) 619; L. R. 2 Eq. 71; 14 W. R. 579; 15 L. T. (N. S.) 9.

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the canal, they should be allowed to use the superfluous water of the canal for the purposes of works of which they are occupiers under an agreement for a lease with the defendant, the use of the water of the canal, though convenient and economical, not being absolutely essential to the plaintiffs' works, will not form the foundation of an equitable right; but it is otherwise if plaintiffs, with the knowledge of a defendant, have incurred expense in establishing a manufacture for which the use of the water is absolutely necessary (1).

15. There is a public right of user of a canal with boats propelled by steam power in navigating public canals, provided that it occasions no more than the ordinary injury to the canal which is occasioned by traction by horses (2).

Ferries.

16. The right of holding a ferry, with the privilege of taking tolls, is a franchise which the Chancellor will protect not only by redress for the past, but by restraining repeated disturbance; more especially Equity will interfere if the right has been established by judicial action (3). An exclusive legal right ought to be protected not only by redress for the past, but, in Equity, against violations of hourly repetition and interminable duration. Hence, Equity will sustain a bill for an injunction where the owner of a public ferry loses part of his rightful profits by means of a ferry established near his, without right (4).

SECT. 4. *Mines, Minerals.*

1. There is a *prima facie* inference at Common Law upon every demise of minerals or other subjacent strata, where the surface is retained by the lessor, that the lessor is demising them in such

(1) *Bankart v. Tennant*, L. R. 10 Eq. 141.

(2) *Case v. Midland Railw. Co.*, 27 Beav. 247; 5 Jur. (N. S.) 1017.

(3) *Newport v. Taylor*, 16 B. Mon. 699 (Amr.).

(4) *Long v. Beard*, N. C. Term R. 256; *M. Roberts v. Washburne*, 10 Min. 23; 16 B. Mon. 699 (Amr.); *vide Letton*

v. Goodden, L. R. 2 Eq. 123; 35 L. J. (Ch.) 427; 14 W. R. 554; *Cory v. Yarmouth and Norwich Railw. Co.*, 3 Hare, 593; *Churchman v. Tunstall*, Hard. 162, cited 2 Anstr. 608; *Huzzey v. Field*, 2 C. M. & R. 432; *Campbell's Trustees v. Campbell*, 6 Pat. Sc. Ap 417.

a manner as is consistent with the retention by himself of his own right to support. In the absence of express words shewing clearly that he has waived or qualified his right, the presumption is, that what he retains is to be enjoyed by him *modo et formâ*, and with the natural support which it possessed before the demise, and a Court of Equity will protect that right by injunction (1). So to a grant or demise of the surface, the right to support is incident, and cannot be taken away except by a clear indication in the instrument of such an interest (2). And even though mines cannot be worked at all without causing the surface to subside, the owner of the surface has an absolute right to have his surface supported, and is entitled to restrain the owner of the mines from letting it down, unless authorized to do so by the Legislature (3); and a custom entitling the lord in his workings to let down the surface, though proved, is bad and void (4). But a grantor can by express contract derogate from his grant, and, while excepting mines, may reserve a right to remove the vertical and also the lateral support (5). If the superior in a feu charter reserve minerals with the right to work them, the right reserved is a right of property or an absolute ownership, and not a mere servitude or easement, and the surface and the minerals are separate tenements severed in title, and the Court will not grant an interdict to restrain the superior from making a tunnel through the minerals for the conveyance of other minerals belonging to him in lands adjacent (6). Although a grantor of a freehold reserve to himself minerals, among which one mineral cannot be gotten without totally destroying the surface, yet the owner of the surface is entitled to an injunction to restrain the owner of the minerals from getting that mineral in such a way as to destroy or seriously injure the surface (7).

(1) *Dugdale v. Robertson*, 3 K. & J. 695; 3 Jur. (N.S.) 687.

(2) *Proud v. Bates*, 10 Jur. (N. S.) 441; 34 L. J. 406.

(3) *Wakefield v. Buccleuch (Duke of)*, 36 L. J. (Ch.) 763; L. R. 4 Eq. 613; *Buccleuch (Duke of) v. Wakefield*, L. R. 4 H. L. 377.

(4) *Ib.*

(5) *Williams v. Bagnall*, 15 W. R. 272.

(6) *Hamilton (Duke of) v. Graham*, L. R. 2 H. L., Sc. App. 166.

(7) *Hext v. Gill*, L. R. 7 Ch. 699; 41 L. J. (Ch.) 761, 293; 27 L. T. (N.S.) 291; 20 W. R. 957, 520; 26 L. T. (N. S.) 502.

2. Upon a conveyance of land for the express purpose that buildings or other works shall be erected upon it, the right of working minerals being reserved to the vendor, the purchaser is entitled to support from the adjacent and underlying soil, not only for the surface land, but for the buildings erected upon it; and this right is not affected by the circumstance that the conveyance is to a company taking the land under compulsory powers, and not from the vendor voluntarily (1). But although the purchaser is entitled to the natural support of the soil, he cannot rely upon the permanence of a merely accidental state of circumstances for which he has not stipulated; therefore, although a vendor will be restrained from working the mines underneath or adjacent to the land purchased, so as to cause any injury to the surface and superincumbent works, the purchaser cannot, in the absence of any contract, compel him to keep the mine filled with water to the exclusion of any future working, notwithstanding that it has been in this drowned, abandoned condition for forty years before the time of the purchase (2). But a railway company which has taken lands for the purposes of their railway under the Lands Clauses Act (8 Vict. c. 18) and the Railways Clauses Act (8 Vict. c. 20), and has had them conveyed to themselves by a conveyance in the usual form, is not entitled to prevent the owner of the mines, subjacent or adjacent, from working and winning away the same without making compensation; and it makes no difference that the mines and minerals are necessary for the support of the railway; and if the company, after notice of intention to work, refuse to make compensation for the mines requisite for the support of their railway, they can only compel the mine-owner to work his mines in a proper manner according to the custom of the district (3).

3. If the barrier between two mines has been perforated, though it has been done by the plaintiff, and wrongfully done, yet if the owner of one of the mines artificially conducts his water so as to pass by the perforations into the other mine (that mode

(1) *North Eastern Railw. Co. v. Elliott*, 6 Jur. (N. S.) 817; *Elliott v. North Eastern Railw. Co.*, 10 H. L. C. 333.

(2) *Ib.*

(3) *Great Western Railway Co. v. Bennett*, 36 L. J. (Q. B.) 133, H. L.

of removing the water from his mine being most beneficial to himself), but he thereby causes irreparable damage to the owner of the other mine, the Court will grant a mandatory injunction, so as to keep things in the state (that is to say, oblige them to be restored to the state) in which they were *ante litem motam* (1). Although a proprietor of a mine in a lower stratum must hold subject to the risk of underground water flowing from ordinary and proper mining operations in upper strata, yet the proprietor of upper strata must work in the ordinary, proper, and skilful way, and must not accumulate a mass of water and then throw that water in a mass into a mine lower down belonging to another proprietor; thus the upper proprietor will be restrained from tapping a stream or river, and thereby letting it in and flooding a lower proprietor's mine (2).

4. The Court will restrain the cutting into coal barriers belonging to a party working coal mines, by a party working adjoining mines, upon a *prima facie* case of the trespass being made out (3). So the Court will grant an injunction prohibitory in form, but mandatory in its effect, against a lessee, tenant of a coal mine, who is acting in contravention of the covenants, to restrain him from permitting a communication with an adjoining mine to continue open, and water to flow therefrom; the effect intended being to compel the lessee to close the communication (4). But where the lessee of a mine has constructed a channel through which water from another mine of the lessee naturally flows, the lessor of the mine, on the determination of the lease, has no right to an injunction to restrain the lessee from permitting his water to flow through the channel in the mine (5).

5. In a suit for an account of coal wrongfully worked by the defendant, where the working is inadvertent and without fraud, the Court will, in assessing the compensation for the coal got by

(1) *Westminster Brynbo Coal and Coke Co. v. Clayton*, 36 L. J. (Ch.) 476; *vide Robinson v. Byron*, 1 Bro. C. C. 588.

(2) *Crompton v. Lea*, L. R. 19 Eq. 115; 23 W. R. 53; 31 L. T. (N. S.) 469; 44 L. J. (Ch.) 69.

(3) *Whaley v. Brancker*, 10 Jur. (N. S.) 535.

(4) *Meaborough (Earl of) v. Bower*, 7 Beav. 127.

(5) *Jegon v. Vivian*, 19 W. R. 365; 40 L. J. (Ch.) 389; L. R. 6 Ch. 742; *Lewis v. Fothergill*, L. R. 5 Ch. 103; *et vide Martin v. Porter*, 5 M. & W. 351.

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a defendant, direct him to be charged only with the fair market value of the coals, as if the coal-field had been purchased by him of the plaintiff (1). But where a mine-owner passes his boundary, and takes coals from his neighbour's mine, although he is liable to account for the value of the coals at the pit's mouth, it will be with just allowances for the cost of raising, but not of getting or severing; and he is also liable for the amount of damage by reason of his having broken through the boundary between his mine and the plaintiff's mine (2). But in assessing damages for trespass done in working coal, the Court will inquire whether the trespass was committed while there was a *bonâ fide* question of title pending, or under a mere assertion of right; and in the former case, the trespasser will be allowed the expenses of winning and getting, as well as of raising and hauling the coal (3). And if the proprietors of a mine so work their mine by opening cuttings to draw off the water therein, that they cause the neighbouring and adjoining mine to be flooded, and from such openings they also abstract coal from their neighbour's mine, and sell the same for their own benefit, the Court will restrain them from further proceeding, and compel them to stop up the existing openings and cuttings, and to give compensation for the damage sustained, and make them account for the value of the coal abstracted (4). It may be laid down generally, that, unless in the case of mines, the rule is—no injunction, no account. But as to mines, a party may have an account even in cases where no injunction will lie (5). If a person only threaten to open mines, the plaintiff may come into Court to restrain him from doing it (6); nor is it necessary to stay till waste is actually committed, where the intention appears, and the person insists on his right to do it (7).

6. The stopping the working of a mine is a thing which of all others a Court of Equity is most averse to do, though it may under certain circumstances be compelled to do it (8); so the

(1) *Hilton v. Woods*, L. R. 4 Eq. 432.

(2) *Llynvi Co. v. Brogden*, L. R. 11 Eq. 188; 40 L. J. (Ch.) 46.

(3) *Jegon v. Vivian*, 19 W. R. 365; 40 L. J. (Ch.) 389; L. R. 6 Ch. 742; *Lewis v. Fothergill*, L. R. 5 Ch. 103; *et vide Martin v. Porter*, 5 M. & W. 351.

(4) *Plant v. Stott*, 21 L. T. (N.S.) 106.

(5) *Parrott v. Palmer*, 3 My. & K. 632.

(6) *Gibson v. Smith*, 2 Atk. 182.

(7) *Ib.*

(8) *Hilton v. Lord Granville*, Cr. & Ph. 283; 4 Beav. 130.

Court with reluctance grants an injunction to stay working a colliery (1).

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7. The right to coal under customary freeholds is the same as in the case of lands of ordinary copyhold tenure; in such lands, *i. e.*, such as are held by copy of Court roll, not at the will of the lord, but according to the custom of the manor, the freehold is in the lord, and in the absence of custom (the onus of establishing which lies upon the tenant) the tenant has no right to work the minerals (2).

SECT. 5. *Customs, Prescription—Right of Common—Fairs, Markets—Fisheries.*

1. A claim as woodwards, or foresters of the Crown, of a right to grant gales or licences for working stone-quarries in uninclosed lands, the soil whereof is in the Crown, and to apply the fees or rents in respect of the gales to the grantors' own use, without accounting to the Crown, cannot exist in point of law; for, with regard to the grantees, it is a claim to subvert the soil, and carry away the substratum without stint or limit, which cannot be established (1) by *custom*, for it is a *profit à prendre*, which cannot be claimed *in alieno solo*; nor (2) by *prescription*, for prescription, to be good, must be both reasonable and certain, and this is neither; nor (3) by presuming a lost grant, for prescription presupposes a grant; and if such a grant cannot be presumed before, *à fortiori* it cannot after, the period of legal memory; and a claim which cannot lawfully be made upon one of these three foundations cannot be substantiated by a user, however long, and is not saved by any Statute of Limitations; and a valid prescription exempting officers of the Crown from accounting for the proceeds of the Crown's soil which they may have sold, cannot be shewn; and the granting of such gales, and the working of quarries under them, will be restrained (3).

Customs,
Prescription.

2. There may unquestionably exist, as to mines, a custom that the lord of the manor cannot take without consent of the copy-

(1) *Anon.*, Amb. 209.

(3) *Att.-Gen. v. Mathias*, 4 K. &

(2) *Portland (Duke of) v. Hill*, L. R. J. 579; 27 L. J. (Ch.) 761.

2 Eq. 765.

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Right of
common.

holder; and, *vice versá*, that the copyholder cannot touch the mine without the consent of the lord; but, with regard to timber, it seems rather admitted as a text doctrine than established by decision (1).

3. If the lord enfranchise a copyhold, with all common thereto belonging, though the common be extinct at Law, yet it subsists in Equity (2). For though the prescription of common to the copyhold is destroyed by the enfranchisement, and the grant of the copyholds, with all common thereunto belonging and appertaining, gives no right of common, because when enfranchised there is no common, in point of law, belonging or appertaining thereunto (3); yet the common subsisting in Equity, a Court of Equity will restrain proceedings at Law by the lord, and decree the tenant the same right of common as belonged to the copyhold prior to the enfranchisement (4).

4. A bill will lie against the lord by one copyholder on behalf of himself and the other copyholders, being numerous, to have their rights of common ascertained; but one copyholder not suing on behalf of all cannot maintain such a bill; the remedy of an individual in such a position being by action at law (5). So a suit for the purpose of establishing a right of common over the wastes of a manor may be maintained by one freehold tenant of the manor, on behalf of himself and all other freehold tenants. And the Court will presume the grant, where the user has been long-continued and uninterrupted, and the burden of proof lies on the lord who seeks to disturb the long-continued user (6). If the lord claims a right to enclose a part of the waste, the onus of shewing that sufficient waste is left for the commoners lies upon the lord (7). Where the lord has attempted to stop the user of a common, the fact that some of the tenants have yielded to such

(1) *Whitechurch v. Holworthy*, 19 Ves. 214, *vide post*.

(2) *Styant v. Staker*, 2 Vern. 250, 2nd Ed.

(3) *Dorson v. Hunter*, Noy, 136.

(4) *Styant v. Staker*, 2 Vern. 250, 2nd Ed.

(5) *Phillips v. Hudson*, L. R. 2 Ch. 243; 15 W. R. 370.

(6) *Warrick v. Queen's College, Oxford*, L. R. 6 Ch. 717; L. R. 10 Eq. 105; 18 W. R. 719; 19 W. R. 1098; 39 L. J. (Ch.) 636; 40 L. J. (Ch.) 780; 25 L. T. (N. S.) 254.

(7) *Betts v. Thompson*, 18 W. R. 1099; 19 W. R. 1098; L. R. 6 Ch. 732; 25 L. T. (N. S.) 363.

attempts is not an interruption of the right within the meaning of the Prescription Act (2 & 3 Will. 4, c. 71), so as to bar the rights of freeholders who, as a body, have never yielded to, or acquiesced in, the claim of the lord (1). So a freehold and copyhold tenant of a manor can maintain a suit to establish a right of common, on behalf of himself and all other the freehold and copyhold tenants, notwithstanding the rights of each freeholder are separate and distinct from those of the copyholders. And notwithstanding the lord of a manor and the tenants may have arranged, more than two hundred years before filing a bill, that a specified extent of the waste might be approved, and that arrangement may not have been disturbed during that time, yet on approving a further portion of the waste the burden lies on the lord of shewing that he is entitled to approve, and that sufficient is left for the commonable rights of the tenants, and in default thereof he will be restrained from enclosing any further part of the common (2).

5. The lords of a manor, although empowered by an Act to grant a limited quantity of parish waste land for a certain purpose, will be restrained from granting part of a village green (part of the waste of the manor), which the inhabitants have been from time immemorial accustomed to use for their amusement and recreation, such common or customary rights not being strictly manorial (3).

6. A right of common of pasture for cattle, appurtenant to lands and tenements over all the waste lands of a Forest, may subsist and be claimed by prescription, and Equity will, at the suit of owners and occupiers of lands in the Forest, restrain the lords of the manors within the Forest from inclosing any part of the waste (4).

7. It is essential to the complaint of an old market, against a

Fairs,
Markets.

(1) *Warrick v. Queen's College, Oxford*, L. R. 6 Ch. 717; L. R. 10 Eq.

105; 18 W. R. 719; 19 W. R. 1098; 39 L. J. (Ch.) 636; 40 L. J. (Ch.) 780; 25 L. T. (N. S.) 254.

(2) *Smith v. Earl Brownlow*, L. R. 9 Eq. 241; 18 W. R. 271; 21 L. T. (N. S.) 739: *et vide Hoare v. Wilson*,

18 W. R. 272, n.

(3) *Forbes v. Ecclesiastical Commissioners of England*, 21 W. R. 169; 27 L. T. (N. S.) 511; 42 L. J. (Ch.) 97; L. R. 15 Eq. 51.

(4) *Commissioners of Sewers v. Glasse*, L. R. 19 Eq. 134; 44 L. J. (Ch.) 129.

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new one set up near it, that the old one was competent to the accommodation of the public, because otherwise they could have no right to complain (1). But a Court of Equity will not interpose unless the title is established either by record (2) or at Law (3).

8. Fairs and markets stand upon a very ancient principle, that persons cannot interpose themselves in the exercise of that franchise against the right conveyed by grant, but no grant can be made, by virtue of that authority, injurious to the common interests of the public; therefore, reasonable tolls only can be demanded, and ancient usage has generally determined what they shall be. But if the claim be to take reasonable rates, then if a person is going to that fair, or to that market, and is refused the accommodation required by law to be given him, the question is not whether he may bring an action for damages for being prevented that enjoyment, but whether a bill in Equity can be filed for an injunction to permit any person to come there that pleased; and certainly such a bill has never been heard of (4).

Fisheries.

9. A several and free fishery in a river, though belonging to parties not owners of the water or of the bed of the river, will be protected from the construction of a sewer, the outlet to which is intended to open into the river within the limits of the free fishery (5).

10. Parties will be restrained from fishing in a river, at the suit of the grantees of the fishery from the river to the sea, where the title has been established (6).

SECT. 6. *Copyholds.*

1. A Court of Equity has concurrent jurisdiction with Courts of Law to relieve a copyholder against an illegal seizure of the copyhold property by the lord, and is not limited to compelling the lord to do right as between two persons claiming to be copy-

(1) *Ex parte O'Reilly*, 1 Ves. Jun. 114.

(2) *Anon.*, 1 Ves. Sen. 476.

(3) *Anon.*, 2 Ves. Sen. 414.

(4) *Weale v. West Middlesex Water Co.*, 1 Jac. & W. 373.

(5) *Oldaker v. Hunt*, 19 Beav. 485; 6 De G. M. & G. 376; 31 Eng. Law and Eq. 503 (Amr.).

(6) *Ashworth v. Browne*, 10 Ir. Ch. Rep. 421.

holders; and the circumstance of the copyhold lands being subject to a demise by the copyholder is such a circumstance as renders it the more proper course to seek relief in Equity, on the ground that unless the plaintiff was willing to put an end to the lease of his tenant by taking proceedings against him to enforce a forfeiture, so as to proceed at once against the lord, either by ejectment or trespass, for the wrong he had sustained at his hands, the tenant must wait until the determination of the lease before his rights could be ascertained (1). Equity has jurisdiction over a judgment in a copyhold Court (2).

2. The lord of a manor has not by law, independently of custom, any such property or interest in the timber growing on the copyhold premises of a tenant as entitles him to enter without the consent of the tenant and cut down to his own use and benefit the timber growing thereon, leaving a sufficient quantity for reasonable botes and estovers; and a Court of Equity will in such a case restrain the lord from so doing (3). The estate of a copyholder in an ordinary copyhold is an estate in the soil throughout, except as regards timber-trees and minerals, as to these, the property is in the lord; but in the absence of custom, the lord cannot get them, for the possession is in the copyholder. But if the lord remove the minerals, the copyholder is entitled to the possession of the space where the minerals formerly were. It is therefore a trespass on the part of the lord to bring under a manor, through that space, minerals from mines outside that manor, and the copyholder is entitled to an injunction to restrain the trespass (4).

3. The lord of the manor is entitled to an injunction and an account in respect of waste by a copyholder (5). A copyholder tenant in fenny and marshy lands may, by custom, be entitled to dig up the lord's soil for turf; but an occupant, who is no more than a tenant at will, can never have a right to take away the soil of the lord, that is to say, a right to a common of turbary. But if

(1) *Andrews v. Hulse*, 4 K. & J. 392;
4 Jur. (N. S.) 581; *et vide Litton's Case*, Cary, 8; Viner's Abr., "Cop." E. d., pl. 2 (vol. vi. p. 152); Coke, Cop. s. 9; Fitzherbert, Nat. Brev., p. 12; Com. Dig. "Cop." p. 2; Fitz. Abr. tit. "Subpœna," 21.

(2) 1 Roll. Abr. 60, 373.

(3) *Whitechurch v. Holworthy*, 19 Ves. 213; S. C. 4 M. & S. 340, *vide* p. 78, *ante*.

(4) *Eardley v. Granville*, 3 Ch. D. 826; 24 W. R. 528; 34 L. T. 609.

(5) *Richards v. Noble*, 3 Mer. 673.

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there be no such custom, the Court will stay waste in digging up the lord's soil (1). A custom in a manor that copyholders of inheritance may break the surface and dig and get clay without stint, out of their copyhold tenements for the purpose of making bricks to be sold off the manor, is good in law (2). And there may be a custom to dig vitreous or silver sand, used for the purpose of making glass, on the tenant's own tenement, and also a custom to dig sand generally. And further, a custom may be good for copyholders to carry away the entire soil of their copyhold tenements. Evidence of a custom to dig such vitreous sand for twenty-seven years, and of a custom to dig sand generally for a long period, is sufficient; and the Prescription Act (2 & 3 Will. 4, c. 71, s. 1) applies only to cases where a person claims by custom, prescription, or a profit or a benefit *à prendre* from the land of another, and has no application to a right claimed by a copyholder on his copyhold tenement according to the custom of the manor, which is not, for this purpose, the land of the lord of the manor. That statute does not invalidate the natural effect of acts not thirty years old as evidence in support of the existence of a custom, and the Court will not restrain a copyholder from exercising such customs, if established (3).

SECT. 7. *Leases.*

1. A lessor will not be allowed to derogate from his grant (4), and Equity will aid a tenant in preventing his landlord from breaking a covenant which will work a forfeiture of his (the tenant's) estate, although not made with the tenant, and even when a suit at Law cannot be maintained on such covenant (5). So Equity will also restrict a lessee to the specific performance of his covenants (6).

2. It is no defence for the assignee of an original lease who has

(1) *Dean, &c., of Ely v. Warren*,
2 Atk. 189.

(2) *Salisbury (Marquis of) v. Gladstone*, 9 H. L. C. 692.

(3) *Hanmer v. Chance*, 11 Jur.
(N. S.) 397; 34 L. J. (Ch.) 413; 4 De
G. J. & S. 626.

(4) *Newby v. Harrison*, 1 J. & H.
393; 4 L. T. (N. S.) 424.

(5) *Rogers v. Danforth*, 1 Stockt.
289 (Amr.).

(6) 2 Story, Eq. 27; 2nd Ed.; *Nutbrown v. Thornton*, 10 Ves. 159.

taken a renewed lease, to say that he would be liable to forfeiture of the renewed lease if he were compelled to give specific performance of an agreement entered into by himself when the original lease was assigned to him. If the circumstances which give rise to the danger of forfeiture originate in a defendant's own acts, the Court will in such a case decree specific performance against the defendant, and leave him open to the consequences of his own acts (1). Upon a contract for an agreement to renew a lease, the solvency or insolvency of the tenant is an objection of weight, depending upon the circumstances, and the insolvency and other circumstances, will disentitle the tenant to an injunction against an ejectment by a landlord who has entered into such an agreement (2).

3. There is no equity to compel a lessor of a lease which has been disclaimed—for instance by a trustee in bankruptcy—to grant an under-lease in accordance with the terms of an agreement by a lessee to make an under-lease, where the provisions of that agreement differ in material respects from those in the original lease; and the Court will not restrain an ejectment against a party who is in possession under such an agreement (3). But a tenant in possession is entitled to a specific performance of a parol agreement for a lease from his lessor, where having contracted to sublet, his sub-lessee has expended money in alterations and repairs with the knowledge and approval of the original lessor; for where a tenant already in possession, acting on the faith of a parol agreement with his lessor, afterwards does anything which alters his position for the purpose of carrying out a new contract, that takes the case out of the Statute of Frauds, and the Court will restrain an ejectment against the original lessee (4).

(1) *Helling v. Lumley*, 4 Jur. (N. S.) 868; 28 L. J. (Ch.) 249.

(2) *Buckland v. Hall*, 8 Ves. 92.

(3) *Taylor v. Gillott*, L. R. 20 Eq. 682; 44 L. J. (Ch.) 740; 32 L. T. (N. S.) 795; 24 W. R. 65.

(4) *Williams v. Evans*, L. R. 19 Eq. 547, 554; 44 L. J. (Ch.) 319; 23 W. R. 466; 32 L. T. (N. S.) 359; *vide Nunn v. Fabian*, L. R. 1 Ch. 35.

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SECT. 8. *Executions, Elegit.*

1. If a decree has been obtained by a creditor on behalf of himself and other creditors, a prior creditor who has obtained judgment at Law in ejectment grounded on an elegit, will not be allowed to get into possession (1). The 27 & 28 Vict. c. 112, which enacts (s. 1), that no judgment entered up thereafter shall affect any land until such land shall have been actually delivered in execution by virtue of a writ of elegit, and the writ registered, but that the judgment creditor to whom land has been actually delivered in execution shall be entitled forthwith to have the benefit of his judgment (2), does not, however, deprive a judgment creditor of his charge who is unable to have the land delivered to him (3). As between debenture-holders of a railway company and judgment creditors, a debenture-holder cannot obtain an injunction to restrain a judgment creditor from suing out an elegit (4). A judgment creditor under an elegit has a right to have such possession of the land as may avail him, subject to the right and interest of the receiver and collector of rates, tolls, and dues obtained by a debenture-holder; and to the provisions of the Act of Parliament as to the user of the undertaking for the public (5). He may, under his elegit, take the rolling stock and chattels of the company (6), but he will be restrained from taking up the rails or the fixtures (7).

2. With regard to the terms upon which a judgment will be enjoined, where a judgment debtor comes into Equity for protection on the ground that he has satisfied the judgment, the door is fully open for the Court to modify or grant his prayer, upon such conditions as justice demands (8).

(1) *Sumner v. Kelly*, 2 Sch. & Lef. 398.

(2) See *Re Isle of Wight Ferry Co.*, 34 L. J. (Ch.) 194; *Re Hull and Hornsea Railw. Co.*, 35 L. J. (Ch.) 838.

(3) *Thornton v. Finch*, 4 Giff. 515.

(4) *Russell v. East Anglian Railw. Co.*, 3 Mac. & G. 104.

(5) *Potts v. Warwick and Birmingham Canal Co.*, Kay, 142.

(6) See *Gardner v. London, Chatham, and Dover Railw. Co.*, L. R. 2 Ch. 201.

(7) *Legg v. Mathieson*, 2 Giff. 71.

(8) *Mechanics, &c. v. Lynn*, 1 Pet. 376 (Amr.).

SECT. 9. *Forfeitures.*PART II.
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1. A Court of Equity cannot restrain a party from forfeiting an estate in expectancy in order to defeat a security thereon—thus a tenant for life in remainder cannot be restrained from forfeiting his life estate by his non-user of a name and arms clause, in order to enable a party to realise a charge thereon under a judgment (1). The Court will not relieve against a forfeiture arising under a contract between a plaintiff and defendant, if the defendant has fully performed his part of the contract, and that although the contract give an alternative option to the defendant not involving a forfeiture, if the alternative option do not abridge or qualify the right of a forfeiture—for instance, the Court will not relieve a builder against a forfeiture for default in completing buildings in a certain time, if the landlord has fully performed his part of the contract, although the landlord have an alternative option not involving a forfeiture (2).

SECT. 10. *Covenants.*

1. A Court of Equity will not relieve against a wilful voluntary breach of covenant (3). But if a defendant prevents the plaintiff's performance of a covenant, a Court of Equity will remove the opposition (4). The Court will restrain the breach of a covenant, though the breach has been of a gradual and not of a conspicuous character (5). An act which is only impliedly forbidden under a covenant, will be restrained (6). It is no defence to say that the covenantee sustains no damage from a breach, for if a covenantor derives any benefit therefrom, there is no reason why the covenantee should not get some benefit of it (7).

2. If a covenant in a lease is indefinite or uncertain in its terms

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| (1) <i>Seiple v. Holland</i> , 33 Beav. 94. | 541; 35 L. J. (Ch.) 393; 14 L. T. |
| (2) <i>Croft v. Goldsmid</i> , 24 Beav. 312. | (N. S.) 134. |
| (3) <i>Descarlett v. Dennett</i> , 9 Mod. 22. | (6) <i>Hall v. Box</i> , 18 W. R. 820. |
| (4) <i>Wood v. Tirrell</i> , Cary, 59. | (7) <i>Wells v. Attenborough</i> , 19 W. R. |
| (5) <i>Mitchell v. Steward</i> , L. R. 1 Eq. | 465; 24 L. T. (N. S.) 312. |

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the Court will not interfere by way of injunction (1). But if the covenants in a lease are clear and distinct, and the breach is also clear and distinct, and irreparable injury is likely to arise, it is the duty of the Court to interfere, and, if required so to do, by granting an interlocutory injunction. If these conditions are not fulfilled, according to the whole course of the Court, it becomes a question of comparative injury—on which side would greater injury be caused?—and the Court will weigh the balance of inconvenience occasioned by granting or refusing an interlocutory injunction (2). If the construction of a covenant or contract is clear, and the breach clear, it is not a question of damage, but the mere circumstance of the breach of contract affords sufficient ground for the Court to interfere by injunction (3). And the Court will in such cases exercise its jurisdiction by granting a mandatory injunction (4). And it would appear that the Court may so interfere whether the breach has or has not actually been committed, for in a case of contract it is enough if the defendant claims and insists on a right to do the act, although he has not already done it *modo et formâ*, as alleged (5). But no injunction will be granted to restrain a breach of a covenant which is too vague (6).

3. Where there is a covenant not to do a particular act, and a penalty or forfeiture is annexed to the doing of that act, the jurisdiction of the Court is not ousted by the imposition of the penalty, nor does it authorize the party to do the act, and before the act is done the Court will restrain him by injunction (7). And after the act is done, the Court will restrain the continuance of the breach where the sum is in the nature of a penalty and not of liquidated damages (8). The restraining of a breach of covenant, where the

(1) *Low v. Innes*, 10 Jur. (N. S.) 1037; 4 De G. J. & S. 286; 11 L. T. (N. S.) 217.

(2) *Wilkinson v. Rogers*, 12 W. R. 284.

(3) *Tipping v. Eckersley*, 2 K. & J. 264; *vide Leech v. Schweder*, L. R. 9 Ch. 463; 22 W. R. 633; 43 L. J. (Ch.) 487; 30 L. T. (N. S.) 586; *Manners (Lord) v. Sutton*, 1 Ch. D.

673; 45 L. J. (Ch.) 404; 24 W. R. 481.

(4) *Manners (Lord) v. Sutton*, *supra*.

(5) *Tipping v. Eckersley*, *supra*.

(6) *Armstrong v. Courtenay*, 15 Ir. Ch. Rep. 138.

(7) *French v. Macabe*, 2 D. & War. 269; 1 Con. & L. 459, 559.

(8) *Bray v. Fogarty*, 18 W. R. 1152; 4 Ir. R. Eq. 544.

covenant is secured by forfeiture of the lease and a penalty, is in the nature of specific performance, and the breach of the agreement may consist in repeated acts (1). The mere power of re-entry for a breach of a covenant does not preclude a lessor from coming to a Court of Equity to restrain the commission of the breach, nor is he bound to adopt his remedy of re-entry (2).

4. The Court will entertain a bill in a proper case, although filed by a person not clearly entitled to sue for damages at Law, if it be established that a substantial agreement was entered into to the benefit of which the plaintiff is, in Equity, entitled (3). And the right to enforce in Equity, the benefit of a covenant affecting the enjoyment of land will pass to the alienee of that land, without being specifically mentioned in the instrument of alienation. But it is doubtful whether, where there are two alienees of land, each of whom covenants with his vendor respecting the mode of enjoyment of that land, and also whether, where the alienees neither covenant with each other, nor take any engagement with the vendor; in such cases either alienee has any remedy against the other infringing the covenant (4). But if an estate vested in trustees is sold in plots subject to restrictive covenants, of which the vendors as covenantees are trustees for all persons claiming under them, each purchaser has an equity against the other purchaser to compel the observance of the covenants, but such equity may be lost by acquiescence (5). But a plaintiff in a suit to enforce such an equity, though barred by acquiescence or otherwise from his remedy by injunction, may obtain damages in Equity. And that even though no action would be maintainable at Law by the plaintiff, and a deviation sanctioned by the vendors in breach of their duty cannot displace the plaintiff's equity under such covenants (6).

5. In a case resting simply upon covenant, if the party seeking specific performance of a covenant be in possession, he has a right

(1) *Barrett v. Blagrove*, 5 Ves. 5 De G. M. & G. 739.

555.

(4) *Ib.*

(2) *Parker v. Whyte*, 32 L. J. (Ch.)

520.

(5) *Eastwood v. Levers*, 33 L. J.

(Ch.) 355; 12 W. R. 195; 9 L. T.

(3) *Child v. Douglas*, 1 Kay, 560,

575; 2 Jur. (N. S.) 350; *et vide* S. C.

(N. S.) 615; 4 De G. J. & S. 114.

(6) *Eastwood v. Levers*, *supra*.

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to the enjoyment of the property *modo et formá*, according to his covenant; but if he be entitled in remainder or in reversion only, he must shew that he has sustained some material or special damage by reason of the breach to entitle him to relief of this nature. Thus a Court of Equity will not, at the instance of a person having a mere reversionary interest in the freehold, interfere to restrain the breach of the covenant entered into by the tenant, with the lessor, against carrying on a business upon the demised premises, unless special or material damage is shewn. A remainderman cannot have any remedy on the mere ground of infraction of a special agreement, but must shew special damage by reason of such infraction. And it would appear that if there is any injury to the material of a house and premises, or if a grossly noxious trade has been carried on, in breach of a covenant, a party may be entitled to relief, although claiming in remainder only, and not in possession (1).

6. Acquiescence in the violation of a covenant to a certain extent, is a sufficient objection to an interlocutory application for an injunction against a greater violation of it (2). And on such an application by way of motion to restrain an alleged breach of covenant, if the question in dispute appears doubtful, the burden of proof is on the plaintiff, to shew that the balance of convenience is in favour of granting the injunction (3). But acquiescence by a covenantee in a partial deviation from a building plan, and delay in making an immediate application to the Court, will disentitle the covenantee to an injunction to restrain the breach (4); and a landlord who relaxes in favour of some of his tenants, a covenant entered into for the benefit of all, is not entitled to an injunction to restrain the other tenants from infringing that covenant (5). So no injunction will be granted where there is a much greater facility of indemnifying the plaintiff than the defendant, according as the one or the other may succeed at Law (6). If a covenantee

(1) *Johnstone v. Hall*, 2 K. & J. 414; 2 Jur. (N. S.) 780; 25 L. J. (Ch.) 462.

(2) *Child v. Douglas*, 5 De G. M. & G. 739.

(3) *Ib.*

(4) *Roper v. Williams*, T. & R. 18.

(5) *Ib.*

(6) *Rigby v. Great Western Railw. Co.*, 2 Ph. 44; 1 Coop. C. C. 3; 4 Railw. Cas. 491; 10 Jur. 488, 531.

has no notice of breaches of covenant during the term, till after the end of the term, the Court will not grant specific performance of a covenant to renew (1). If the right to renewal depends upon the performance of a condition precedent—for instance a covenant to repair—the Court will not grant specific performance of the covenant to renew, nor restrain an action of ejectment by the lessor (2).

7. If a party's own encroachments in breach of a covenant, are immaterial, and do not interfere with the enjoyment of others, he will not be disentitled to complain of an infringement, if any, by another party in breach of a similar covenant (3).

8. A covenant running with the land is binding on the assignee of the lessee, and that although his "assigns" are not named in the covenant; and an injunction will be granted to restrain a breach of such a covenant—for instance, a covenant to use a house as a dwelling-house only—by an assignee and his subtenant of the lease (4). But a purchaser for value is not bound by a restrictive covenant framed to run with the land, unless he has actual notice of it, or unless such precautions have been taken, that if he had made proper inquiries he would necessarily have had notice of it (5). A purchaser of a reversion with notice of a restrictive covenant with reference to other lands, affecting the lands purchased by himself, is bound in Equity thereby (6).

9. An assign of a covenantor is bound in Equity if he has notice of a covenant (7); and if parties purchase land with notice of a covenant concerning it, though the covenant does not run with the land so as to bind the parties at Law, yet Equity will not permit them to do anything contrary to the true meaning of that

(1) *Thompson v. Guyon*, 5 Sim. 593; L. R. 9 Eq. 678; 39 L. J. (Ch.) 65.

(2) *Finch v. Underwood*, L. R. 2 Ch. D. 310; 45 L. J. (Ch.) 522; 24 W. R. 657; 34 L. T. 779.

(3) *Child v. Douglas*, 1 Kay, 560, 575; 2 Jur. (N. S.) 350.

(4) *Wilkinson v. Rogers*, 12 W. R. 119.

(5) *Carter v. Williams*, 18 W. R.

(6) *Jay v. Richardson*, 30 Beav. 563.

(7) *Child v. Douglas*, 1 Kay, 560; 575; 2 Jur. (N. S.) 350; *et v. S. C.* 5 De G. M. & G. 739; *Whatman v. Gibson*, 9 Sim. 196; 7 L. J. (N. S.) Ch. 160; 2 Jur. 273.

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covenant (1); and a covenant, though in gross at Law, being one that does not run with the land so as to be binding at Law upon a purchaser from the covenantor, is nevertheless binding in Equity upon an assignee with notice. And the Court will restrain a breach of such a covenant, although the plaintiff has not established the validity of the covenant at Law, as binding upon the assignee of the land. The question in such cases is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased; and a Court of Equity will enforce an equity attached to the land by the owner, under such circumstances as will not maintain an action at Law (2).

10. A clause in a conveyance of land, by which it is agreed that a piece of land adjoining that retained by the grantor and that sold to the grantee, shall never be thereafter sold, but left for the common benefit of the parties and their successors, does not contravene any rule of Law, but is a mere agreement to leave the land open for the advantage of the two adjoining proprietors, and such a contract creates an equity between the original parties, binding all who come into possession derivatively with notice of it (3).

11. A covenant between a lessor and lessee, for themselves and their assigns, to do any matter which concerns the lands demised, falls within the rule laid down in *Spencer's Case* (4), and must be considered as a covenant that runs with the land. The respective assignees of the parties, therefore, will have the benefit of, and be bound by, all such covenants (5). But the interference of Equity

(1) *Patchings v. Dubbins*, 23 L. J. (Ch.) 45; 1 Kay, 1; 17 Jur. 1113; *et vide Cooke v. Chilcott*, L. R. 3 Ch. D. 694; 34 L. T. 207.

(2) *Tulk v. Moxhay*, 2 Ph. 774; 1 H. & T. 105; 11 Beav. 571; *vide Western v. MacDermott*, L. R. 2 Ch. 72; 35 L. J. (Ch.) 190; 36 L. J. (Ch.) 76; 15 W. R. 265; L. R. 1 Eq. 499; *Wilson v. Hart*, L. R. 1 Ch. 463; 2 H. & M. 551; 12 L. J. Ch. (N. S.) 460.

(3) *McLean v. McKay*, L. R. 5 P. C. 327; 21 W. R. 798; 29 L. T. (N. S.) 352; *et vide Tulk v. Moxhay*, *supra*.

(4) 5 Rep. 17; *et vide Dalby v. Wells*, 3 Wils. 26, 29, 32; S. C. Wilmot's Notes, 344, 345, 349; *Mayor of Congleton v. Pattison*, 10 East, 135.

(5) *Vernon v. Smith*, 5 B. & A. 7, 11; and see the *Anonymous Case*, Moor, 159, pl. 300.

in such cases is discretionary, though a Court of Equity has, no doubt, the power to restrain and enjoin, for the very purpose of preventing the necessity of resorting to an action of covenant; but this jurisdiction will only be exercised upon just occasions, and to prevent wanton or fraudulent vexation (1).

12. If a deed contain an absolute covenant not to do an act, such covenant will not, in the absence of a bill to rectify the deed, be controlled by a recital in the deed from which it appears that the parties intended that such act might be done on payment of a fixed sum for liquidated damages; and an interlocutory injunction to restrain acting against the words of the covenant will be granted (2); but a covenant in a deed, if ambiguous, will be controlled by the recitals (3).

13. If a representation is made by a party that by reason of covenants he cannot, during the term of his lease, build otherwise than in a particular way, that representation he is bound to make good. And though such a party, after making such representation, surrender that lease and take a new one, not containing the restrictive covenants in the lease surrendered, yet the right of the party to whom such representation was made will not be affected by the surrender of the first lease; and a plaintiff will on that ground be entitled to an injunction to restrain such party from building in contravention of such covenants. And even if by reason of the surrender, such covenants are gone, the plaintiff will be entitled to an injunction from the equity arising from such parol representation of the defendant; for what the defendant in such a case says, amounts to a representation that he cannot, during the term of the lease, build otherwise than in a particular way (4).

14. A conveyance in fee to the use that certain trades shall not be carried on upon the property, amounts to a covenant and is binding (5).

15. A covenant for perpetual renewal, entered into by a person

(1) *Waters v. Taylor*, 2 V. & B. 302 (2 Hov. Sup. to Ves. 454).

(2) *Bird v. Lake*, 1 H. & M. 111.

(3) *Selby v. Crystal Palace Gas Co.*, 30 Beav. 606.

(4) *Piggott v. Stratton*, 1 De G. F. & J. 33; 1 Joh. 341; 6 Jur. (N. S.) 129.

(5) *Hodson v. Coppard*, 29 Beav. 4; 7 Jur. (N. S.) 11.

having a limited interest in lands, does not bind the estate, and therefore, if his assignee acquires the inheritance, it is not bound by the covenant (1).

16. There is a distinction between an express covenant and an implied agreement (with reference to removing articles on a farm held by lease, contrary to the custom of the country), as regards enforcing the same by an injunction, in cases of tenancies from year to year, after cesser of a lease by effluxion of time; an injunction will be granted where there is an express covenant in the expired lease, against a tenant holding over from year to year, after the expiration of his lease, to restrain him from removing articles contrary to the custom of the country; but no injunction will be granted against such a tenant, against removing articles contrary to the custom of the country, upon an implied agreement (2).

17. But in cases of tenancies originally and so continuing from year to year, a Court of Equity will restrain a tenant, as in the case of a lessee for a longer term, from doing damage by cutting and damaging the hedgerows, &c., and from removing the crops manure, &c., contrary to the usual course of husbandry, and except according to the custom of the country (3).

18. A Court of Equity will restrain a breach of farming covenants (4). And it will grant an injunction against ploughing up pasture upon a covenant to manage pasture in a husbandlike manner, that being equivalent to an express covenant not to convert pasture to arable (5). So it will restrain a tenant from ploughing up meadow for the purpose of building, if there is an express covenant in his lease not to convert any meadow, otherwise it is doubtful whether the Court will grant an injunction on the ground of waste, if there be no covenant, without evidence that it is an ancient meadow (6).

19. A Court of Equity will restrain a tenant holding under

(1) *Brereton v. Tushey*, 8 Ir. Ch. R. 190.

(2) *Kimpton v. Eve*, 2 V. & B. 349.

(3) *Onslow v. —*, 16 Ves. 173.

(4) *Fleming v. Snook*, 5 Beav. 250.

(5) *Drury v. Molins*, 6 Ves. 328.

(6) *Grey de Wilton (Lord) v. Saxon*, 16 Ves. 106; *vide Pulteney v. Shelton*, 5 Ves. 147, 260, n.; and *Hov. Sup.* to Ves. 497.

a sub-lease from doing an act whereby the title of his lessor may be evicted (1).

20. A covenant to repair, and at the end of the term to surrender the buildings in good condition, will not preclude an injunction against pulling them down and carrying away materials just before the end of the term (2).

21. The Court will not enforce a covenant where it would be necessary to try in each instance whether the act was a prejudice to the covenantees. The parties will be left to make what they can of such a covenant at Law (3). And it is open to much argument whether, with reference to motives of public policy, a Court of Equity would act upon a covenant of such a nature, between the owner of a well and the proprietors of waterworks as to the sale of water from the well (4).

22. A first remainderman in tail, and, as such, claiming an estate by purchase, though not bound by a lease made before he became entitled, but who has for several years—for instance six—received the rent, and has lain by and suffered the rebuilding of a house, and has not denied that he had notice of the lease, will be decreed to make a new lease, with proper covenants for the remainder of the term (5).

23. A tenant covenanting to repair (damage by fire only excepted) continues liable to payment of rent notwithstanding the premises are destroyed by fire; and if he covenant to pay rent during the term, it must be paid notwithstanding the premises are burned down during the term (6). The fact of the premises being insured makes no difference. The tenant has no equity to compel the landlord to expend the insurance money in rebuilding the premises, or to restrain him from suing for the rent until the premises are rebuilt (7).

24. A Court of Equity will grant no relief against a covenant to repair in a given time, though there is no request by the land-

(1) *Mason v. Mason*, Fl. & R. 429;
vide Farrant v. Lovel, 3 Atk. 723, 3rd
Ed.

(2) *London (Mayor of) v. Hedger*,
18 Ves. 355.

(3) *Collins v. Plumb*, 16 Ves. 454.

(4) *Ib.*

(5) *Stiles v. Cooper*, 3 Atk. 692.

(6) *Hare v. Groves*, 3 Anstr. 687;
Holtzapfel v. Baker, 18 Ves. 115;
Gregg v. Coates, 23 Beav. 33; *Poole v.*
Adams, 33 L. J. (Ch.) 639; *Fowler v.*
Bott, 6 Mass. 67 (Amr.).

(7) *Leeds v. Cheetham*, 1 Sim. 146.

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lord, unless there be a stipulation rendering it necessary, and though the tenant has been suffered to continue in possession merely, without rent, &c., and though the specified time in the lease has been inserted by mistake; and the *quantum* of damage is no criterion (1). A notice to quit does not absolve the tenant from the performance of the covenants in his lease (2). And although the parts out of repair have been rebuilt, the Court will not interfere (3). But the Court will allow a reasonable time to repair (4). And it will relieve against the consequences of a breach of covenant to repair, where the lessee is unable, from circumstances over which he has no control, to complete the repairs within a specified time (5). But if a lessee is led by the lessor to think that a notice given by him to the lessee to repair has been suspended during negotiations—for instance, negotiations for a purchase of the premises by the lessor—it is clearly against equity and good conscience that the lessor should take advantage of a forfeiture, and he will be restrained from proceeding to execution on a judgment in ejectment against the lessee for the forfeiture (6).

25. A covenant in a lease not to let, set, or demise the premises, or any part, for all or any part of the term, without consent, restrains assignment (7); and the Court will enforce by injunction a covenant in a lease not to assign without license (8); and such covenants not to assign, underlet, or otherwise part with the possession without consent in writing of the lessor, touch and concern and therefore run with the land, and the lessor can sue an assignee of the lessee for a breach (9).

26. The Court will grant no relief against a forfeiture by a

(1) *Bracebridge v. Buckley*, 2 Price, 473; 9 Jur. (N. S.) 1192; 7 L. J. (N. S.) 365.

200; *Gregory v. Wilson*, 9 Hare, 689; *vide Bargent v. Thompson*, 4 Giff, 475.

(2) *Gregory v. Wilson*, 9 Hare, 683.

(3) *Job v. Banister*, 26 L. J. (Ch.) 125; 3 Jur. (N. S.) 93; *vide Guage v. Lockwood*, 2 F. & F. 115.

(4) *Ib.*

(5) *Bargent v. Thompson*, 4 Giff.

(6) *Hughes v. The Metropolitan Railw. Co.*, L. R. 1 C. P. D. 121; 45 L. J. (C. P.) 578; 24 W. R. 652.

(7) *Greenaway v. Adams*, 12 Ves. 395.

(8) *Dyke v. Tylor*, 3 De G. F. & J. 467.

(9) *Williams v. Earle*, L. R. 3 Q. B. 739.

breach of a covenant not to assign without license (1); but it would appear that equitable agreements giving charges upon the property comprised in a lease, not accompanied with a change of the possession, or other alteration in the property, will not, in Equity, work a forfeiture of a lease, notwithstanding there is a clause in the lease against assignments, if the acts which are relied upon as having worked a forfeiture can be got over by the plaintiff (2). An assignment by operation of law is no breach of a condition not to assign, *ex gr.*, if the lessee become bankrupt, or the lease be taken in execution, unless such an event be brought about by the fraudulent procurement of the lessee himself (3). But the lessor may, by the insertion of express, clear, and distinct words, render even such an assignment a fine or forfeiture (4). Upon a covenant not to assign or underlet without the consent of the lessor, but with a proviso that such consent is not to be withheld without some reasonable objection, the Court will not restrain the lessee from underletting, where there is no reasonable ground for withholding consent (5).

27. Relief in Equity against forfeiture is only given where the breach of a covenant has been the omission of a simple money payment, such as rent (6), unless under special circumstances, as where the covenantor has been misled, and he has been mistaken as to the consequences of his breach of the covenant (7); nor will relief be given against the breach of a covenant for payment of rent, if breaches of other covenants have been committed, for which the plaintiff might have been ejected (8).

(1) *Hill v. Barclay*, 18 Ves. 63; *v. Hawkes*, 2 East, 481; *Doe v. Clarke*, 8 East, 185; *Doe v. David*, 5 Tyrw. 125; *Cooper v. Wyatt*, 5 Madd. 482; *Yarnold v. Moorhouse*, 1 Russ. & My. 364; *R. v. Robinson*, Wigh. 386.

(2) *Bowser v. Colby*, 1 Hare, 138; *(5) Sheppard v. Hongkong and Shanghai Banking Corporation*, 20 W. R. 459.

(3) *Weatherall v. Geering*, 12 Ves. 509; *(6) Keating v. Sparrow*, 1 Ball. & B. 367, 373; *Job v. Banister*, 2 K. & J. 382; *Bowser v. Colby*, 1 Hare, 109, 133, 134.

(4) *Doe d. Wyndham v. Carew*, 2 Q. B. 317; *Roe v. Galliers*, 2 T. R. 133; *(7) Shearman v. Macgregor*, 11 Hare, 106.

Davis v. Eyton, 7 Bing. 154; see *Doe (8) Bowser v. Colby*, *supra*, 134.

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28. Prior to the 22 & 23 Vict. c. 35, a Court of Equity would grant no relief by injunction against a forfeiture for breach of a covenant to insure and to keep insured (1), or to pay the premiums and keep up a policy of insurance (2); and insurance after the breach had been committed had no effect in curing the breach (3). But the Court has now been empowered by that Act (ss. 4—9) to give relief against the breach of a covenant or condition to insure against loss or damage by fire, where no loss by fire has happened, and the breach has been committed through accident, mistake, or otherwise, without fraud or gross negligence, and there is an insurance on foot at the time of the application to the Court, in conformity with the covenant to insure; but the Court cannot relieve more than once in respect of the same covenant or condition; nor can relief be given where a forfeiture under the covenant has been already waived out of Court in favour of the person seeking the relief. Relief may be given for breaches of covenant committed after the passing of the Act, in leases granted before the statute (4).

29. However, Equity will relieve against forfeiture, if the covenant to insure has been performed substantially, though it may not have been literally performed.

30. At Law, a covenant by the lessee to insure in the name of the lessor only, is not performed by an insurance in the joint names of the lessor and the lessee, because the arrangement is not so beneficial to the landlord as the arrangement for which he had stipulated (5). But in Equity, relief will be given against forfeiture where the manner in which the insurance has been effected is not so beneficial to the lessor as that for which he had

(1) *Green v. Bridges*, 4 Sim. 96; *White v. Warner*, 2 Mer. 459; *Rolfe v. Harris*, 2 Price, 207, n.; *Reynolds v. Pitt*, 19 Ves. 140; *Elliott v. Turner*, 13 Sim. 477; *Gregory v. Wilson*, 9 Hare, 683; *Shearman v. Macgregor*, 11 Hare, 106; *Nokes v. Gibbon*, 3 Drew. 681; *Meek v. Carter*, 4 Jur. (N. S.) 992.

(2) *Winthrop v. Murray*, 8 Hare, 214.

(3) *Reynolds v. Pitt*, 19 Ves. 140; *Green v. Bridges*, 4 Sim. 96; *Elliott v. Turner*, 13 Sim. 477; *Gregory v. Wilson*, 9 Hare, 689; *Nokes v. Gibbon*, 3 Drew. 681; *Meek v. Carter*, 4 Jur. (N. S.) 992.

(4) *Page v. Bennett*, 2 Giff. 117; 6 Jur. (N. S.) 419.

(5) *Penniall v. Harborne*, 11 Q. B. 369; see *Ilavens v. Middleton*, 10 Hare, 641.

stipulated, if the covenant has been on the whole substantially complied with (1).

31. Where a breach of covenant is threatened, and has been partly executed, a Court of Equity having jurisdiction to restrain the breach, will, under statutory powers (2), also award damages in respect of the executed breach (3). If a breach of covenant is proposed, the Court will not refuse to interfere on the ground that there has been a mistake on the part of both parties in the form of the covenants, or that the aggrieved party may have already permitted some other infringement of the covenant, or on the ground of inconvenience to the public (4). The circumstance that a work undertaken in breach of a valid covenant is one of great public importance, is not sufficient to induce a Court of Equity to refuse to restrain the breach of covenant (5). And before the Court will refuse to enforce a covenant, it must be clear that no substantial damage can arise from the breach of it (6). And when the Court refuses to enforce a covenant because the damage would be inappreciable, the case must be perfectly clear (7).

32. Upon a covenant not to build or allow trees to grow above a certain height, the object of which is to prevent obstruction of the view from certain houses, substantial injury is not requisite in order to enable the Court to interfere and restrain a breach of the covenant. And a person entitled to complain of such breach of covenant has not waived his right by a passive acquiescence in other breaches. Acquiescence in a breach of covenant not attended with substantial damage will not bar the right to restrain a subsequent breach so attended. And an injunction will be granted at the suit of the owner of one of such houses, in respect of which the different owners have severally entered into such a covenant with the grantor of the whole of them, restraining a breach of the covenants by the owner of another house, notwith-

(1) *Rogers v. Tudor*, 6 Jur. (N. S.) 692. *Dover Railw. Co.*, 34 L. J. (Ch.) 401; 13 W. R. 698; 12 L. T. (N. S.) 362.

(2) *Vide* Sir Hugh Cairns' Act, 21 & 22 Vict. c. 27; the Supreme Court of Judicature Acts, 1873 and 1875 (36 & 37 Vict. c. 66, 38 & 39 Vict. c. 77).

(3) *Hindley v. Emery*, 11 Jur. (N. S.) 874. 11 Jur. (N. S.) 380; 2 De G. J. & S. 568.

(4) *Lloyd v. London, Chatham and*

(5) *Ib.*

(6) *Lloyd v. London, Chatham, and Dover Railw. Co.*, 34 L. J. (Ch.) 401; 13 W. R. 698; 12 L. T. (N. S.) 362;

(7) *Ib.*

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standing that small breaches of the covenants by other owners may not have been interfered with, and that he himself may have committed a small breach. And a purchaser, with notice of the covenants, is bound by them in Equity (1). But if a vendor to several purchasers, has permitted, without interference, material breaches of a covenant taken from them severally, to be committed by some of the purchasers, he cannot obtain an injunction to compel another of the purchasers to observe the same covenant; and there is no difference in the case where the covenant is not only a covenant by each purchaser with the vendor, but also a covenant by each purchaser with all the others; nor in the case where the breaches have been committed before the defendant became a purchaser and executed the deed of covenant (2).

33. A restrictive covenant in an assignment of a lease, will be enforced by the Court, on behalf of the covenantee, against persons with constructive notice, though the covenantee has no reversion (3). A Court of Equity will enforce the performance of a covenant, where a party is fixed with constructive notice of the covenant, and a lessee is bound to inquire into, and is fixed with notice of, all the covenants which his lessor has entered into, in respect of the land (4).

34. A tenant from year to year, without express notice of a covenant, is bound by it, if he have constructive notice, and the rule that a purchaser who does not inquire into his vendor's title is affected with notice of what appears upon it, applies equally to a yearly tenant, as to the purchaser of a greater interest (5).

35. If there be a breach of an implied covenant on the part of a lessor in respect of something which is essential to the enjoyment of the property by the lessee, and which is the basis of the agreement, the Court will, as far as possible, replace the parties in their original positions, and restrain proceedings on the express

(1) *Western v. Macdermott*, L. R. 2 Ch. 72; 35 L. J. (Ch.) 190; 36 L. J. (Ch.) 76; 15 W. R. 265; L. R. 1 Eq. 499.

(2) *Peck v. Matthews*, L. R. 3 Eq. 515.

(3) *Clements v. Welles*, L. R. 1 Eq. 200; 35 L. J. (Ch.) 265.

(4) *Fielden v. Slater*, L. R. 7 Eq. 523; 38 L. J. (Ch.) 379; 17 W. R. 485; 20 L. T. (N. S.) 112.

(5) *Wilson v. Hart*, L. R. 1 Ch. 463; 2 H. & M. 551; 12 L. J. (Ch.) (N. S.) 460.

covenants (1). So if one party to a contract in respect of personal property and service break^a an implied covenant which is important, in the contract, he will not be entitled to restrain the other party to the contract from breaking any other part of the agreement (2).

36. A Court of Equity has jurisdiction by injunction to restrain further breaches of a covenant, where the covenantee has been compelled repeatedly to resort to Law to such an extent as to become vexatious (3).

37. Though where a contract contains an express negative covenant, and complete justice can be done between the parties, a Court of Equity will grant an injunction to restrain a breach of the negative covenant; yet the Court rarely interferes where there is no distinct negative stipulation, but the negative obligation is inferred only from the positive contract (4). But the Court will not grant an interlocutory injunction to compel the performance of a negative clause in an agreement unless the negative clause is clear, or irreparable injury would be likely to result to the plaintiff from refusing the injunction (5). The Court will restrain a defendant from acting contrary to a negative agreement, although it cannot specifically enforce the performance of the whole of the agreement (6).

SECT. 11. *Nuisance.*

1. The general principle on which a Court of Equity interferes in cases of nuisance is the inadequacy of the remedy which the Common Law gives in such cases. The jurisdiction of a Court of Equity rests on the ground of injury to property; and taking it

(1) *Aeraman v. Price, Davies v. Tunbridge Wells Railw. Co.*, 1 H. & Price, 18 W. R. 540; 19 W. R. 364; M. 468; 32 L. J. (Ch.) 677.
24 L. T. (N. S.) 487.

(2) *Telegraph Despatch and Intelligence Co. v. McLean*, L. R. 8 Ch. 658. (5) *Mapleson v. Bentham*, 19 W. R. 176, 177.

(3) *Waters v. Taylor*, 2 V. & B. 302; *Great Northern Railw. Co. v. Manchester, Sheffield and Lincolnshire Railw. Co.*, 5 De Gex & Sm. 138; 16 Jur. 146; *et vide Lumley v. Wagner*, 5 De Gex & Sm. 485; 1 De G. M. & G. 604.
(4) *Peto v. Brighton, Uckfield, and*

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to rest upon that ground, the only distinction which seems to exist between cases of public nuisance and private nuisance is this, that in cases of private nuisance the injury is to individual property, and in cases of public nuisance the injury is to the property of mankind (1). Nuisances against which Courts of Equity grant injunctions must be such as are a material injury to property, or to the comfort of the existence of those who dwell in the neighbourhood (2).

2. In determining whether relief ought to be granted against a permanent and serious nuisance, regard will be had not only to the comfort and convenience of the occupier of the land for the time being, but to the prospective effect of the nuisance in diminishing the value of the land, and with the prospect of advantageously dealing with it (3). With respect to the considerations of comfort and convenience, the material question, in all cases of nuisance involving those considerations, is, whether the annoyance produced is such as materially to interfere with the ordinary comfort of human existence (4).

3. A Court of Equity restrains such nuisances only as are nuisances at Law; the fears of mankind, though reasonable, will not create a nuisance (5). In cases of nuisance the mere apprehension of damage is not sufficient to entitle a party to an injunction, actual damage must be established (6). The Court will not interfere *quia timet* in a case of merely prospective injury and alleged nuisance, the actual existence of the nuisance must be proved (7). The Court will not restrain a merely contingent nuisance (8); or where it is uncertain whether or not mischief will happen (9). Although a prospective nuisance is not in itself a ground for the interference of the Court, yet if some degree of

(1) *Att.-Gen. v. Sheffield Gas Consumers Co.*, 3 De G. M. & G. 304, 319; *Att.-Gen. v. Nichol*, 16 Ves. 388.

(2) *Luscombe v. Steer*, 17 L. T. (N. S.) 229; 15 W. R. 1191.

(3) *Goldsmid v. Tunbridge Wells Improvement Commissioners*, L. R. 1 Eq. 161; L. R. 1 Ch. 349; 12 Jur. (N. S.) 308; 14 W. R. 92, 562; *vide Att.-Gen. and Dommes v. Mayor, &c., of Basingstoke*, 24 W. R. 817.

(4) *Crump v. Lambert*, L. R. 3 Eq. 409; 17 L. T. (N. S.) 133.

(5) *Baines v. Baker*, Amb. 158.

(6) *Brown v. Gogy*, 2 Moo. P. C. C. (N. S.) 341.

(7) *Att.-Gen. v. Kingston-upon-Thames (Mayor, &c.)* 11 Jur. (N. S.) 596.

(8) *Haines v. Taylor*, 2 Ph. 209; 10 Beav. 75.

(9) *Ripon (Earl of) v. Hobart*, 3 Myl. & K. 169; Coop. t. Brougham, 333.

present nuisance exist, the Court will take into account its probable continuance and increase, and restrain the nuisance before it has become permanent and continuous (1). But if there is a probability of immediate prospective nuisance, a Court of Equity will interfere and grant an injunction (2). And the Court will restrain threatened alterations, and alterations begun which it is satisfied will prevent the comfortable enjoyment of a plaintiff's premises (3).

4. If certain individuals suffer an injury or special damage from a public nuisance quite distinct from that done to the public at large, the Court will entertain a bill filed by those individuals to be relieved from the nuisance (4). And they may sustain the bill without making the Attorney-General a party (5).

5. There is no doubt that a Court of Equity, when it is satisfied of the existence of a nuisance which it has the power to abate or redress, whether public or private, will not hesitate to exercise its jurisdiction and authority (6). The Court has this jurisdiction by injunction on danger of irreparable injury to property, though as a public nuisance it is an object of prosecution by the Attorney-General (7).

6. Equity will restrain a threatened act, punishable as a public nuisance, which also would cause special damage to the plaintiff himself (8). As, for instance, where there is extraordinary injury to his property, irreparable in damages, or without a multitude of actions (9). The Court will not, except in extreme cases, interfere by injunction to prevent nuisances if temporary and occasional only (10). If there is good ground for concluding that a present nuisance is temporary, an interim injunction will not be

(1) *Goldsmid v. Tunbridge Wells Improvement Commissioners*, L. R. 1 Eq. 161; L. R. 1 Ch. 349; 12 Jur. (N. S.) 308; 14 W. R. 92, 562.

(2) *Att.-Gen. v. Kingston-upon-Thames (Mayor &c.)* 11 Jur. (N. S.) 596.

(3) *Palmer v. Paul*, 2 L. J. (Ch.) 154.

(4) *Spencer v. London and Birmingham Railw. Co.*, 8 Sim. 193; *Sampson v. Smith*, 8 Sim. 272.

(5) *Sampson v. Smith*, 8 Sim. 272.

(6) *Roskell v. Whitworth*, 19 W. R. 804.

(7) *Crowder v. Tinkler*, 19 Ves. 617.

(8) *Walker v. Shephardson*, 2 His. 384; *Mississippi &c., v. Ward*, 2 Black. 485; *Zabriskie v. Jersey, &c.*, 2 Beasl. 314 (Amr.).

(9) *Parrish v. Stephens*, 1 Oreg. 73 (Amr.).

(10) *Swaine v. Great Northern Railw. Co.*, 10 Jur. (N. S.) 191; 4 De G. J. & S. 211.

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granted (1). Nor if the evidence as to nuisance is altogether conflicting, and an inspection of the works alleged to cause the nuisance is impracticable, will an interlocutory injunction be granted (2). Except in a case of irreparable damage, or of substantial damage, or perhaps of continuous damage, a Court of Equity will not interfere by injunction unless the acts complained of are done under a claim of right (3). Where a manufactory is lawful in itself, but requires the greatest caution to prevent the escape therefrom of injurious gases, the Court will not restrain a defendant from carrying on his manufactory because occasionally, through the occurrence of accidents in the manufactory, the plaintiff is injured, and the Court will only interfere where the injury is grave or frequent. A Court of Equity has power to interpose in behalf of one who is injured by a continuing, permanent, or recurring private nuisance, unless the injury may be compensated in damages (4). So Equity will entertain jurisdiction when a nuisance is likely to occasion a special injury to one individual, which cannot be compensated in damages (5). Though the actual resulting damage may be small, the Court will interfere in cases which threaten danger to the stability of permanent structures (6). But where a nuisance or damage is trivial, the Court will not grant an injunction (7). But although it is not enough to shew a nuisance to constitute a case for an injunction, yet if it be a continuing nuisance, an injunction will not be refused because the actual damage arising from it is slight (8).

7. A nuisance by noise (supposing malice to be out of the question) is emphatically a question of degree; it ought beyond

(1) *Cleeve v. Mahaney*, 9 W. R. 882.

(2) *MCurdy v. Noak*, 17 L. J. (N. S.) Ch. 165.

(3) *Martin v. Douglas*, 16 W. R. 268, Ir. R.

(4) *Norris v. Hill*, 1 Man. 202; *Clack v. White*, 2 Sw. 540; 1 Gill & J. 184 (Amr.).

(5) *Millau v. Sharp*, 28 Barb. 228 (Amr.).

(6) *Dent v. Auction Mart Co.*, 35 L. J. (N. S.) Ch. 555.

(7) *Att.-Gen. v. Sheffield Gas Consumers Co.*, 3 De G. M. & G. 304; 16 Jur. 677; 22 L. J. (Ch.) 811; *Att.-Gen. v. Cambridge Gas Consumers Co.*, L. R. 4 Ch. 71; 38 L. J. (Ch.) 94; 17 W. R. 145; 19 L. T. (N. S.) 508.

(8) *Gaunt v. Fynney*, L. R. 8 Ch. 8, 12, 14; 21 W. R. 129; 27 L. T. (N. S.) 569; 26 L. T. (N. S.) 308; 42 L. J. (Ch.) 122.

question to be such as would be regarded as exceptional and unreasonable (1). It is not every occasional or accidental noise that will entitle a plaintiff to an injunction, if a general case of habitual nuisance is not satisfactorily proved (2).

8. Equity will restrain the commission of an act injurious to an individual, or which may be prejudicial as a public nuisance, pending judicial proceedings before tribunals by which the authority to do the act or its lawfulness is to be determined (3).

9. Where a Court of Equity finds any real apprehension of serious and immediate injury to health, or of any pressing character of the like nature (such as the cases of stench or of apprehended inundation), it will interfere to prevent such irreparable injury, pending a decision at Law of the question of nuisance or no nuisance (4). But if the evidence is satisfactory, the Court will grant an injunction against a nuisance without having the question, whether there is a nuisance, tried before a jury (5). Wherever substantial damages in respect of a nuisance might be recovered at Law, a Court of Equity will restrain its continuance (6).

10. A party's right to have his property protected from injury, cannot be affected by the fact that in his manufactory he uses a process of great delicacy (7).

11. Though the small extent of a plaintiff's interest will not necessarily disentitle him to relief from a nuisance, yet it is a material ingredient for consideration (8), especially when the balance of inconvenience on the one side and the other has to be examined; a consideration of which the Court never loses sight in injunction cases (9).

12. If a party lie by, and allow expenditure to be incurred, and

(1) *Gaunt v. Fynney*, L. R. 8 Ch. 8, 12, 14; 21 W. R. 129; 27 L. T. (N. S.) 569; 26 L. T. (N. S.) 308; 42 L. J. (Ch.) 122.

(2) *Ib*; *Cooke v. Forbes*, L. R. 5 Eq. 166.

(3) *Williamson v. Carnan*, 1 Gill & J. 184 (Amr.).

(4) *Eaden v. Firth*, 1 H. & M. 573; *vide Swaine v. Great Northern Railw. Co.*, 33 L. J. (Ch.) 399.

(5) *Inchbald v. Robinson*, *Inchbald v. Barrington*, L. R. 4 Ch. 388; 17 W. R. 459; 20 L. T. (N. S.) 259.

(6) *Crump v. Lambert*, L. R. 3 Eq. 409; 17 L. T. (N. S.) 133.

(7) *Cooke v. Forbes*, 37 L. J. (Ch.) 178; 17 L. T. (N. S.) 371.

(8) *Jacomb v. Knight*, 32 L. J. (Ch.) 601, 604; 9 Jur. (N. S.) 529.

(9) *Jacomb v. Knight*, *supra*.

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a trade which might be a nuisance in point of Law, to be established and carried on for a considerable period, without asking for the interference of a Court of Equity, or bringing an action, he will be precluded by acquiescence from obtaining relief in Equity, though the trade has been gradually increasing (1).

13. To have a work erected at great expense, whether private or public, removed by a Court of Equity as a nuisance, the person complaining should have given notice not to proceed, otherwise the Court will leave the complainant to Law (2). And a party may so encourage another in the erection of a nuisance, as to give him an equity for an injunction to restrain an action for damages (3).

14. Though there may be cases where the public might lose their right to an injunction by laches (4), this does not apply to a case of a gradually growing nuisance (5). Yet time is an ingredient which is to be considered in determining a question of injunction, although the application be on behalf of the Attorney-General; and laches may be a defence to an application for an injunction by way of information, as well as by a bill (6). But a delay which would be important on an interlocutory application for an injunction, will be no bar to relief by injunction at the final hearing of the cause (7).

15. The Court considers it a very strong course to stop the carrying on a trade or manufactory by interlocutory injunction (8). Where an injunction—in substance mandatory—is asked to restrain a nuisance caused by smoke and deleterious vapours arising from great commercial works—as collieries, for instance—carried on in the usual manner, the plaintiff must shew substantial and sensible damage, and such as would be visible to ordinary persons conversant with the subject matter; it must also be actual, and not contingent, prospective, or remote; but if it be substantial it does not matter how that fact is made out, whether

(1) *Swaine v. Great Northern Railw. Co.*, 9 Jur. (N. S.) 1196.

(2) *Jones v. Royal Canal Co.*, 2 Moll. 319.

(3) *Williams v. Earl of Jersey*, Cr. & P. 91.

(4) *Att.-Gen. v. Johnson*, 2 Wils. 87.

(5) *Att.-Gen. v. Bradford Navigation Co.*, 35 L. J. (Ch.) 619.

(6) *Att.-Gen. v. Sheffield Gas Consumers Co.*, 3 De G. M. & G. 304.

(7) *Turner v. Mirfield*, 34 Beav. 390.

(8) *Att.-Gen. v. Charles*, 11 W. R. 253.

by the sense of sight or feeling, or by the eye of a scientific person, or by the eye of anybody else (1).

16. A Court of Equity has power to interfere with a public body in the exercise of powers conferred by Act of Parliament, where such bodies exercise their powers otherwise than *bonâ fide* (2). But if there is a *bonâ fide* exercise of their powers, and it is not certain or probable that the works intended will be or create a nuisance, or it is not certain or probable that such bodies are exceeding their Parliamentary powers, the Court will not grant an interlocutory injunction (3).

17. Although the motives with which a suit is instituted are not generally to be regarded, they are not wholly immaterial when the complaint is of an alleged public injury or nuisance; and the views of the majority of the inhabitants of a town, and of their governing body, are not immaterial or without weight on such questions (4).

18. Where a party in the exercise of private rights over his own property, on a portion of his own land, does acts which interfere with his neighbour's right to the enjoyment of pure air, and causes injury to the neighbour's property, and there are other situations on his land where he might do the same acts with equal, or nearly equal, benefit to himself, and without any or with considerably less inconvenience to his neighbour, the Court will interfere by injunction, and will refuse to direct an action to try the question of whether the acts complained of amount to a nuisance or not (5).

19. A party is entitled to an injunction to restrain the pollution of the water of a river passing by his property, though it be done by direction of a local board of health (6). The owner

(1) *Salvin v. North Brancepeth Coal Co.*, L. R. 9 Ch. 705, 706, 709, 713; 22 W. R. 904; 31 L. T. (N. S.) 154; 44 L. J. (Ch.) 149.

(2) *Biddulph v. St. George's, Hanover Square*, (Vestry of), 3 De G. J. & S. 493; 9 Jur. 434, 953; 11 W. R. 524, 739; 8 L. T. (N. S.) 44, 558; 33 L. J. (Ch.) 411.

(3) *Biddulph v. St. George's Hanover Square* (Vestry of), *supra*.

(4) *Att.-Gen. v. Sheffield Gas Consumers Co.*, 3 De G. M. & G. 304; *Att.-Gen. v. Cambridge Gas Consumers Co.*, L. R. 4 Ch. 71; 38 L. J. (N. S.) 94; 17 W. R. 145; 19 L. T. (N. S.) 508.

(5) *Beardmore v. Tredwell*, 3 Giff. 683; 9 Jur. (N. S.) 272; 7 L. T. (N. S.) 207; 31 L. J. (N. S.) Ch. 892.

(6) *Bidder v. Croydon Local Board of Health*, 6 L. T. (N. S.) 778.

of land on the banks of a river can, in the absence of any express reservation by the party offending, of the right of fouling, restrain the fouling of the water of the river, without shewing that the fouling is actually injurious to himself (1). Where a prescriptive right to foul a stream has been acquired, the fouling must not be considerably enlarged to the prejudice of other people (2).

20. Where a plaintiff has proved his right to an injunction against a nuisance or other injury, it is no part of the duty of the Court to inquire in what way the defendant can best remove it, and the plaintiff is entitled to an injunction at once, unless the removal of the injury is physically impossible; and it is the duty of the defendant to find his own way out of the difficulty, whatever inconvenience or expense it may put him to (3).

21. A Court of Equity will not restrain acts which are alleged to be a public nuisance, and also injurious to the private rights of a private person, until the question of nuisance and injury has been first determined at Law (4), where, under the circumstances, a jury would be the best tribunal for the trial, both of the public and private nuisance; for the question, what is a nuisance, is one peculiarly fitted for the investigation of a jury; and in an ordinary case, where the issue of a suit in Equity depends upon a legal right, that right must be ascertained in an action before any relief can be granted by a Court of Equity (5), unless it be clearly proved, that the plaintiff has sustained such substantial injury as would have entitled him to a verdict for damages in an action at Law (6).

22. If a nuisance is irremediable, and not capable of compensation, the Court can impose terms, pending the trial of the question of nuisance, to protect the property in its existing state (7).

23. Pending proceedings to try a right, for instance, the right

(1) *Crossley v. Lightowler*, L. R. 2 Ch. 478; 36 L. J. (N. S.) Ch. 584.

(2) *Ib.*

(3) *Att.-Gen. v. Colney Hatch Lunatic Asylum*, L. R. 4 Ch. 146; 38 L. J. (Ch.) 265; 17 W. R. 240; 19 L. T. (N. S.) 708.

(4) *Att.-Gen. v. Cleaver*, 18 Ves. 211, 220.

(5) *Att.-Gen. v. United Kingdom Electric Telegraph Co.*, 31 L. J. (Ch.) 329; 30 Beav. 287; 5 L. T. (N. S.) 338; *White v. Cohen*, 1 Drew. 312.

(6) *Elmhirst v. Spencer*, 2 Mac. & G. 45.

(7) *White v. Cohen*, 1 Drew. 312.

of a plaintiff to the use of water, as he claims it, by a watercourse, the Court will restrain a defendant from obstructing such watercourse (1). If an injunction is applied for in respect of a violation of a Common Law right, and the existence of that right, or the fact of its violation, is denied, the plaintiff is obliged to establish or prove his right at Law before he is entitled to an injunction; the ordinary rule is not to grant an injunction to restrain a nuisance until the existence of the nuisance has been established at Law (2), but having done that, he is, except under special circumstances, entitled to an injunction to prevent a recurrence of that violation, and if pending proceedings at Law, to ascertain the existence of a right, or the fact of its violation, an alteration in the mode of carrying on the business is complained of, in increase of the cause of injury, that need not be the subject of a fresh proceeding at Law; that is matter for the discretion of the Court of Equity (3). But an injunction will be granted before a trial at Law for the decision of the legal right, to restrain a nuisance, upon evidence of ill consequences suffered by some of the plaintiffs and their families from the noxious effects of the nuisance (4). Where the inconvenience to the public will be none, or very small, the Court will not grant an injunction to restrain a nuisance, for instance, the diminishing the width of a road (5). If the injury by a nuisance to a trade is accidental and occasional only, and careful precautions are taken to prevent the nuisance, and there is no exceptional risk, a Court of Equity will not restrain the nuisance (6). But it is no answer to a complaint by a manufacturer, of a nuisance to his trade, to say that the injury is felt only by reason of the delicate nature of the manufacture (7). A nuisance cannot be justified by the existence of other nuisances of a similar character, if it can be

(1) *Dewhurst v. Wrigley*, Coop. C. P. 319.

(2) *Imperial Gaslight and Coke Co. v. Broadbent*, 7 H. L. C. 600; 7 De G. M. & G. 436; 5 Jur. (N. S.) 1319; *Broadbent v. Imperial Gaslight and Coke Co.*, 3 L. J. (N. S.) 221; 2 L. J. (N. S.) 1132.

(3) *Imperial Gaslight and Coke Co.*

v. Broadbent; *Broadbent v. Imperial Gaslight and Coke Co.*, *supra*.

(4) *Pollock v. Lester*, 11 Hare, 266.

(5) *Wandsworth Board of Works v. London and South Western Railw. Co.*, 31 L. J. (Ch.) 854; 8 Jur. (N. S.) 691.

(6) *Cooke v. Forbes*, L. R. 5 Eq. 166.

(7) *Ib.*

shewn that the inconvenience is increased by the nuisance complained of (1). Where there is no suspicion of rivalry in trade being the motive, the Court shews a disposition less carefully to balance the comparative inconvenience caused to the contending parties by granting or withholding an injunction, and to consider more the absolute wrongdoing (2). Motives of public policy are not allowed to be brought forward by a wrongdoer to maintain him in his wrong (3). Where a nuisance causes substantial and permanent damage to an individual, the Court will not refuse an injunction, even though the act causing the nuisance may, in its results, be beneficial to the public (4). But if a plaintiff, in such cases, sustain a merely trifling or no material injury, the Court will not grant an injunction (5). Though important public interests may be involved, such as the improvement of the drainage of a town, the Court will protect the private rights of an individual if affected in any material degree, but it will, at the same time, have regard to the nature and extent of the alleged injury or nuisance, and to the balance of inconvenience (6). Though an occupier of lands acquiesce in the erection of works on adjoining land, which appear not to be, and are not, in fact, injurious, there is no implied acquiescence in the natural extension of those works in the ordinary course of operations; acquiescence in the erection of noxious works while they produce little injury, does not warrant the subsequent extension of those works to an extent productive of great damage (7). Delay in applying for an injunction to restrain the commission of a nuisance, disentitles a party to relief, and the fact of no serious damage being done in the interval between the commencement of the nuisance and the application, will not excuse the delay (8).

(1) *Crossley v. Lightowler*, L. R. 2 Ch. 478; 36 L. J. (Ch.) 584.

(2) *Imperial Gaslight and Coke Co. v. Broadbent*, 7 H. L. C. 600; 7 De G. M. & G. 436; 5 Jur. (N. S.) 1319; *Broadbent v. Imperial Gaslight and Coke Co.*, 3 L. J. (N. S.) 221; 2 L. J. (N. S.) 1132.

(3) *Ib.*

(4) *Broadbent v. Imperial Gas Co.*, 3 Jur. (N. S.) 221; 26 L. J. (Ch.) 276.

(5) *Lillywhite v. Trimmer*, 36 L. J. (Ch.) 525; *Att.-Gen. v. Gee*, L. R. 10 Eq. 131.

(6) *Lillywhite v. Trimmer*, 36 L. J. (Ch.) 525.

(7) *Bankart v. Houghton*, 27 Beav. 425; 5 Jur. (N. S.) 282; 28 L. J. (Ch.) 473; 7 W. R. 197; 32 L. T. 382.

(8) *Wicks v. Hunt*, 1 Joh. 372.

24. If the occupier of land, proceeding by the license of the owner of the land, perform acts which amount to a nuisance, for which he would have no defence in an action, the owner will be liable as well as the occupier, for the owner is bound to see that his property is so managed that other persons are not injured (1).

25. The landlord of houses let to weekly tenants is within the rule, that a reversioner cannot maintain an action at Law in respect of a temporary nuisance, where the nuisance is temporary it is an injury to the tenant; nor is he entitled to an injunction, but it would seem that the tenant and his landlord may join in a suit to restrain a nuisance which is injurious to the health and comfort of the tenant, and prevents his residing in the rooms or house he may occupy (2). To entitle a reversioner to maintain an action or to obtain an injunction in respect of a nuisance, the injury must be necessarily of a permanent character (3). The right at Law must be established before a bill of peace can be brought to be quieted in the enjoyment of an alleged nuisance (4).

SECT. 12. *Waste.*

1. The general doctrine of a Court of Equity is, that there is no jurisdiction to restrain a trespass unless it amounts to waste (5). The tendency of the authorities upon the subject of injury to real property is to break down the old distinction that existed between waste and trespass. And where a defendant is in possession of an estate, and a plaintiff claiming possession of it, seeks to restrain him from cutting down trees, and digging sods and other such like acts, the Court will not interfere unless the acts complained of amount to such flagrant instances of spoliation as to justify the Court in departing from the general rule: but where a plaintiff is in possession, and the person doing the acts complained of is an utter stranger, not claiming under colour of right, then the tendency of the Court is not to grant an injunction, unless there

(1) *White v. Jameson*, 22 W. R. 761; L. R. 18 Eq. 303.

(2) *Jones v. Chappell*, L. R. 20 Eq. 539, 543; 44 L. J. (Ch.) 658; *Simpson v. Savage*, 1 C. B. (N. S.) 347.

(3) *Mott v. Shoolbred*, L. R. 20 Eq. 22; 44 L. J. (Ch.) 380.

(4) *Anon.*, 2 Ves. Sen. 193.

(5) *Turner v. Ringwood Highway Board*, 18 W. R. 424.

are special circumstances, but to leave the plaintiff to his remedy at Law, though if the acts tend to the destruction of the inheritance, the Court will grant an injunction; but where a plaintiff in possession seeks to restrain one who claims by an adverse title, the tendency of the Court will be to grant an injunction, at least when the acts committed do or may tend to the destruction of the estate, or are injurious to the inheritance (1), (2), or produce possible mischief by irreparable injury (3).

2. Though the Court will, at the instance of a person merely alleging a legal title to realty, grant an injunction to restrain persons in possession of an estate from committing malicious and destructive waste (4), yet such a case must be clearly made out (5). If a defendant in possession decline to try his right to commit the act complained of as waste, by an action at Law, the Court will grant an injunction (6). And if a defendant in possession, though insisting on his own title, admit he received possession in breach of a tenant's duty to his landlord, the plaintiff, the Court will restrain waste by that defendant (7).

3. The authorities as to the jurisdiction of the Court to interfere, at the instance of parties claiming real property under a legal title, by appointing a receiver of the rents and profits, and by injunction to restrain waste, establish these propositions:—First: In the absence of fraud, and where there is no privity between the parties, the Court will not interfere, at the instance of a person so claiming, to grant a receiver against parties in possession. Secondly: Nor will it interfere, at the like instance, to restrain waste, except malicious or destructive waste, *ex. gr.*, by pulling down the capital messuage, stripping the estate of its timber, or other like acts, which no owner would do, or which would destroy the property before they could be arrested at Law. Thirdly: But flagrant acts of this exceptional character would, at the present day, be restrained, and that before judgment at Law;

(1) *Lowndes v. Bettie*, 33 L. J. (Ch.) J. 96; 4 Jur. (N. S.) 1172; 27 L. J. (N. S.) 451; 10 Jur. (N. S.) 226; (Ch.) 273.

12 W. R. 399; 10 L. T. (N. S.) 55.

(5) *Talbot (Earl) v. Scott*, *supra*.

(2) See note p. 64, *ante*.

(6) *Cuddon v. Morley*, 7 Hare, 202,

(3) *Clowes v. Beek*, 13 Beav. 347; 20 L. J. (N. S.) Ch. 505.

affirmed by the Lord Chancellor, 24th Nov. 1849.

(4) *Talbot (Earl) v. Scott*, 4 K. &

(7) *Norway v. Rowe*, 19 Ves. 154.

and notwithstanding plaintiff were out of possession, and his title denied on oath by the defendant (1). Or where the defendant in possession has not, upon notice of the application for the injunction, appeared, and the plaintiff has commenced an action of ejectment in respect of the premises (2). But if an action at Law will give all the remedy a party out of possession claiming adversely is entitled to, the Court will not interfere (3).

4. An injunction to stay waste will not be granted where it is doubtful whether the acts complained of are waste, in such cases the question of waste or no waste must first be decided (4). If the acts of waste committed are trivial, and the plaintiff's proceedings have been dilatory, the Court will refuse an injunction (5). But a small degree of waste, manifesting an intent to do more, will be sufficient for the Court to act upon; though a Court of Equity will look at it in the manner in which the subject is viewed by the Courts of Law, and there the extent of the waste done is considered very material (6). But if a lessee, bound by covenant not to commit waste, has committed acts of waste, for which damages merely nominal would be given, the Court of Chancery will not entertain a suit against him founded on those acts of waste, where it appears that he does not contemplate committing any further waste, nor assert a right to commit it (7).

5. If a case of prospective injury is made out, a Court of Equity has jurisdiction to issue an injunction before waste has actually been committed, and it is not necessary to stay till waste is actually committed where the intention appears, and the person insists on his right to do it (8). Thus the sending a surveyor to mark out trees is a sufficient ground for an injunction, the Court will not wait till they are cut down (9).

(1) *Talbot (Earl) v. Scott*, 4 K. & J. 96; 4 Jur. (N. S.) 1172; 27 L. J. (Ch.) 273: *vide Haigh v. Jagger*, 2 Coll. 231.

(2) *Neale v. Cripps*, 4 K. & J. 472.

(3) *Webster v. South Eastern Railw. Co.*, 1 Sim. (N. S.) 272; 6 Rail. Cas. 698.

(4) *Lyon v. Wilkinson*, 1 L. J. (Ch.) 155.

(5) *Barry v. Barry*, 1 Jac. & W. 651, 653.

(6) *Ib.*

(7) *Doran v. Carroll*, 11 Ir. Ch. Rep. 379.

(8) *Gibson v. Smith*, 2 Atk. 182; *et vide North Eastern Railw. Co. v. Elliott*, 1 J. & H. 145; 2 De G. F. & J. 423; 10 H. L. C. 33.

(9) *Jackson v. Cator*, 5 Ves. 688.

6. The interference of Equity in cases of waste is a wholesome jurisdiction, to be liberally exercised, and depends on much latitude of discretion in the Court (1).

7. Notwithstanding a denial of title, an injunction may issue to stay irreparable mischief or waste (2). And a Court of Equity will interfere to prevent the destruction of the inheritance, even where both title and possession are in dispute (3).

8. Where there is a privity of estate, as between reversioner and particular tenant, an injunction may be had, without irreparable injury; but it is otherwise where the parties are strangers to each other in reference to the estate, or mutually adverse claimants, whether the act be waste or trespass (4).

9. A Court of Equity will, at the suit of trustees, restrain a tenant for life without impeachment of waste, in possession, from cutting timber on estates, if by so doing he would interfere with a discretionary power of felling the timber vested in the trustees; and though exemption from liability to waste annexed to a life estate is a special power in the tenant for life, to appropriate part of the inheritance, yet that power may, by the terms of a settlement, be made subordinate to a discretionary power conferred on the trustees (5); and if, upon the construction of a settlement, the scheme of it is that the timber shall be used to relieve the inheritance of the charges upon it, and that, for this purpose, a power given to the trustees to fell timber is expressly made paramount to the privileges of the tenant for life without impeachment of waste, to cut the timber, though his consent may be made necessary, to enable him to regulate the mode of exercising the power, yet the Court will restrain him from preventing the trustees from felling or receiving the proceeds of the timber (6).

10. A Court of Equity will not interfere unless it is shewn that there is danger from the mode in which a tenant for life in

(1) *Cane v. Vanderburgh*, 1 John. Ch. 11 (Amr.)

Ch. Dec. 371.

(2) *United States v. Parrott*, 1 M'All, C. C. (Cal.) 271 (Amr.)

(5) *Kekewich v. Marker*, 3 Mac. & G. 311.

(3) *Cornelius v. Post*, 1 Stockt. 196 (Amr.)

(6) *Briggs v. Earl of Oxford*, 1 De G. M. & G. 363; 5 De G. & Sm. 156; 16 Jur. 53, 558.

(4) *Georges, &c. v. Detmold*, 1 Ind.

possession is dealing with the property (1). But such Courts have no means of interfering in cases of permissive waste by a tenant for life of real property; and there is no implied trust to keep the property in repair imposed upon a tenant for life under a will, for if there were, he could not convey away his life estate without committing a breach of trust; nor, if he did, could he get rid of the trust by so doing; and a trustee to whom real property is devised in trust for one for life, cannot interfere with the possession of the equitable tenant for life because he neglects to keep the property in repair; therefore such a trustee is not liable to the remainderman for the neglect of the tenant for life to repair; but if the tenant for life is committing active waste it seems that the trustee may, and properly ought to interfere, at least, if the persons entitled in remainder are under disability (2). An equitable tenant for life with remainders over ought not to cut timber without the consent of the trustees (3).

11. Where there is a devise which, by construction of Law, is an estate for life for a defendant in his own right, and a trust in him as to the remainder in fee for the plaintiff, the devisee for life will be enjoined from cutting timber (4).

12. A tenant for life simply (who is therefore impeachable of waste) has no right to take the substance of the estate by opening mines or clay pits; but where the author of the settlement or gift has previously worked them, the tenant for life has a right to continue the working of them, and for this reason, that the author of the gift has made them part of the profits of the land; but it does not follow that the tenant for life has a right to open old abandoned pits, or to commence opening any mines or pits which the author of the gift had merely made preparations for opening; and a tenant for life will be restrained from taking away the substance of the estate before the question has been tried, namely, whether the pits were in such a state as to enable the tenant for life to work them (5).

(1) *Dutt v. Dossee*, 6 Moo. Ind. App. 433.

(2) *Powys v. Blagrove*, 1 Kay, 495; 18 Jur. 462; 4 De G. M. & G. 448; 24 L. J. (Ch.) 142.

(3) *Denton v. Denton*, 7 Beav. 388.

(4) *Wright v. Atkyns*, 1 V. & B. 313; see also 19 Ves. 299; 17 Ves. 255; Coop. 111; T. & R. 143.

(5) *Viner v. Vaughan*, 2 Beav. 466, affirmed by the Lord Chan. 9 June, 1840.

13. If a tenant for life liable to waste, sell timber, the tenant for life himself cannot prevent the vendee from cutting it, he cannot disaffirm his own act; it is for the remainderman to file a bill for the purpose of preventing the vendee from cutting it (1).

14. The Court will prevent the removal of timber wrongfully cut (2). A tenant for life *sans* waste will not be interfered with in the exercise of his legal powers, unless he is proceeding to use those legal powers in a manner inequitable towards those in remainder; therefore he may fell and sell trees planted for ornament, if done in a proper course of husbandry (3).

15. But such tenants will be restrained to a reasonable exercise of the right (4), and will not be permitted, with an express clause without impeachment of waste, to do acts that may destroy the inheritance (5).

16. But there must be destruction and spoliation to ground such an injunction (6). But a tenant for life without impeachment of waste will not be restrained from felling trees fit for the purpose of timber, though young and not such as would be felled in a course of husbandlike management of the estate (7). So a tenant entitled to a life interest in a term of years unimpeachable of waste, has a right to fell timber for his own benefit, which is fit and proper to be cut in the course of a due and husbandlike management of the woods containing the timber (8). But a tenant for life entitled to timber for repairs, cannot sell the same to reimburse herself expenses incurred in repairs (9).

17. A tenant for life without impeachment of waste is at liberty to cut timber generally, treating it in a husbandlike manner, independent of the effect upon the beauty of the place, provided that the exercise of that liberty cannot be checked by a due application of the principles upon which, in the contemplation

(1) *Wentworth v. Turner*, 3 Ves. 3.

(2) *Anon.*, 1 Ves. Jun. 93.

(3) *Halliwel v. Philips*, 4 Jur. 607.

(4) *Aston v. Aston*, 1 Ves. Sen. 521;
Vane v. Lord Barnard (The Ruby Castle Case), 1 Salk. 161; 2 Vern. 738; Prec. Ch. 454; Gilb. Eq. Rep. 127.

(5) *Aston v. Aston*, 1 Ves. Sen. 263

(Belt's Ed.), and the note and references therewith; *vide Marker v. Marker*, 9 Hare, 1, 17.

(6) *Piers v. Piers*, 1 Ves. Sen. 521.

(7) *Smythe v. Smythe*, 2 Sw. 251; 1 Wils. 426.

(8) *Bridges v. Stevens*, 2 Sw. 150.

(9) *Gower v. Eyre*, Coop. 156.

of a Court of Equity, that is waste which is not acknowledged such at Law, that is to say, equitable waste (1). And what a prudent owner would do in the proper course of management, is no measure of what a tenant for life without impeachment of waste, may do as to cutting timber planted or left standing for ornament (2).

18. A tenant for life with liberty to cut timber at seasonable times, is not to cut trees planted for ornament or shelter to the mansion-house, or sapling trees not fit to be cut or felled for timber (3). There is no doubt that a tenant for life may have an injunction to restrain waste, particularly as to ornamental timber, as that is not so much upon his interest as his enjoyment (4). And an injunction will be granted to restrain waste in cutting trees, on a bill by a party who is only tenant for life and has no right to the trees, although a party entitled to the inheritance has not been joined (5).

19. A lessee for lives renewable for ever will, unless under special circumstances, be restrained from committing waste (6), as from cutting turves, though the ground be improved by the waste (7). And although the tenant has immemorially cut turf (8). But he will not be restrained from cutting turf as firebote (9). A tenant lessee will not be allowed to break up ancient meadow or pasture, though the land is mossy and requires tillage (10).

20. A Court of Equity will restrain waste by a lessee for lives renewable for ever, although the act done may lead to the improvement of the land, if it immediately occasion any damage to the inheritance; and it will not refuse to restrain waste by which the estate is not necessarily and permanently improved, on the mere ground that the party has done other acts which will benefit

(1) *Burges v. Lamb*, 16 Ves. 185.

(2) *Ford v. Tynte*, 2 De G. J. & S.

122.

(3) *Chamberlyne v. Dummer*, 3 Bro. C. C. 549.

(4) *Davis v. Leo*, 6 Ves. 784.

(5) *Dayrell v. Champneys*, 1 Eq. C. Abr. 400, cited Dick. 197.

(6) *Coppinger v. Gubbins*, 3 J. & L. 397; 9 Ir. Eq. Rep. 304.

(7) *White v. Walsh*, 1 Jones, 626, n.; *Anon.*, Ib.

(8) *Waterpark (Lord) v. Austen*, 1 Jones, 627, n.; *Purcell v. Walsh*, Ib. 625.

(9) *Salis (Count de) v. —*, 2 Moll. 516; *vide Coppinger v. Gubbins, infra*.

(10) *Martin v. Coggan*, 1 Hog. 120; *vide Coppinger v. Gubbins, infra*.

PART II.
CHAPTER I.
SECT. 12.

the estate (1). But it is doubtful whether the Court will, in such a case (namely, that of a lease for lives renewable for ever), restrain mere acts of meliorating waste by the lessee for lives (2). But a tenant for life who has committed meliorating waste by allowing her tenants to dig turf in fenny lands, but under an obligation to prepare the land for agricultural purposes, is not accountable to the persons entitled in remainder for the value of the turf removed (3).

21. The Court will not interfere to restrain the waste of a sub-tenant at the instance of his immediate landlord, if it appear that the latter has obtained an indemnity against the claims of the head landlord (4). The assignee of a sub-lessee of meadow and pasture land for a term for lives renewable for ever, will be restrained from converting premises into a public cemetery, for it would seem that this would amount to waste at Common Law (5).

22. A mortgagor will be restrained from committing waste to the prejudice of the mortgagee (6). After a decree in a foreclosure suit, a mortgagor in possession will be restrained from committing waste (7). A mortgagor of wood and underwood will not be restrained cutting underwood at seasonable times and proper growth, such an act is not waste; but if the mortgagor be a bankrupt, an injunction will be granted on the right of the mortgagee to have the estate sold in the plight in which it was at the date of the bankruptcy, and to prove the rest of his debt (8). A mortgagee (not applying the produce of timber in sinking the principal and interest) will be restrained from committing waste (9).

23. Although as between lessor and lessee a lease permitting waste may be good against the lessor, yet it is within the province of the Court, while money, due under a settlement to the plaintiff, remains unpaid, to prevent any waste which may tend to injure the security (10). If the debt due to a judgment creditor is in danger of being lost by acts of waste on the part of one who is

(1) *Coppinger v. Gubbins*, 3 J. & Lat. 397; 9 Ir. Eq. Rep. 304; *Leeds (Duke) v. Amlurst*, 2 Ph. 122.

(2) *Ib.*, *vide Salis (Count de) v. —*, *Martin v. Coggar*, *supra*.

(3) *Harris v. Ekins*, 20 W. R. 999.

(4) *Keogh v. Collins*, Hay & J. 805.

(5) *Hunt v. Brown*, Sau. & Sc. 179.

(6) *Farrant v. Lovel*, 3 Atk. 723.

(7) *Goodman v. Kine*, 8 Beav. 379.

(8) *Hampton v. Hodges*, 8 Ves. 105.

(9) *Farrant v. Lovel*, *supra*.

(10) *Turkington v. Kearman*, Ll. & G. t. Sugd. 85.

heir-at-law and administrator of the debtor, the Court will grant an injunction to stay the waste (1).

24. By its general jurisdiction to repress fraud, the Court of Chancery will, although the plaintiff may have a legal remedy, interfere to prevent waste being committed by a tenant for life in collusion with the owner of the first estate of inheritance, or by a person who unites both those characters in himself; and as trustees to preserve contingent remainders may file such a bill during the life of tenant for life in remainder, so may such a bill be instituted by tenant for life in remainder himself. On the same principle, where waste has been committed by a tenant for life at a time when he was also owner of the first estate of inheritance, and when there was no one capable of bringing an action, a bill to make his estate accountable may, after his death, be brought by a tenant for life in possession. But the Court must be satisfied that the acts of the deceased tenant for life were such as amounted to collusion between the two characters which he united in himself; and if the tenant for life, being also ultimate remainderman in fee, lay out sums in permanent improvements on the estate at least equal to the value of the amount realised by the acts of waste, which are themselves of trivial amount, a bill by a tenant for life will be dismissed (2).

25. The Court will interfere if the tenant for life and the remainderman in fee, subject to contingent estates, are committing waste in collusion (3). Or where waste is being committed by a tenant for life in possession, who has the next vested estate of inheritance in remainder, but subject to intermediate contingent estates (4). Where there is an executory devise over even of a legal estate, a Court of Equity will not permit timber to be cut, more especially in the case of a trust estate; and an heir who is entitled by way of resulting trust, until the determination of an event upon which the future contingent estates are to arise, will be restrained from cutting timber (5).

(1) *Leake v. Beckett*, 1 Y. & J. 339.

(3) *Garth v. Cotton*, 1 Dick. 183;

(2) *Birch-Wolfe v. Birch*, L. R. 9 Eq. 683; 39 L. J. (Ch.) 345; 18 W. R. 594; 23 L. T. (N. S.) 216.

1 Ves. Sen. 524, 548; 3 Atk. 751.

(4) *Williams v. Bolton (Duke of)*, 1 Cox, 72.

(5) *Stansfield v. Ilabergham*, 10 Ves. 273.

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26. An injunction will be granted against waste by a tenant for years (1). So the Court will restrain a tenant from year to year under notice to quit, as in the case of a lessee for a longer term, from doing damage, and from removing the crops, manure, &c.; except according to the custom of the country (2). Where the relation of landlord and tenant exists between the parties, the Court sometimes interferes to restrain waste, though the *locus in quo*, being the property of the landlord, is not any part of the demised premises (3).

27. The Court will restrain waste in an under-lessee at the suit of the ground landlord (4). An assignee of a lease is entitled to an injunction to restrain the landlord from cutting ornamental trees on a lawn during the term of the lease, if the conduct of the landlord since the execution of the lease amounted to a consent to the tenant's plan of improvement, laying out the lawn, &c. (5).

28. In cases of waste it is the business of a reversioner to apply to the Court promptly (6). Although the Court in one case (7) ultimately granted an injunction to stay waste by the cutting of timber, at the suit of a devisee in trust against the heir-at-law in possession, who disputed the will; yet in another case (8) an injunction was refused against felling timber, at the suit of a devisee against the heir-at-law in possession admitting the waste, but disputing the will, on the ground that the denial of the title of the devisee and the assertion of the title as heir, made him, if he had no right, a mere trespasser. Where a case of election is raised as against an heir-at-law, the intended devisee will be restrained from committing waste until the heir has been elected (9).

29. An injunction will be granted against waste between tenants in common where one is occupying tenant to the other, but otherwise there is no injunction between tenants in common except as to positive and actual destruction (10). Nor will the Court grant

(1) *Kimpton v. Eve*, 2 V. & B. 349.

(2) *Onslow v. —*, 16 Ves. 173.

(3) *Wrizon v. Condran*, 1 Ir. Eq. Rep. 380.

(4) *Farrant v. Lovel*, 3 Atk. 723.

(5) *Jackson v. Cator*, 5 Ves. 688.

(6) *Barry v. Barry*, 1 Jac. & W. 651, 653.

(7) *Fingal (Earl) v. Blake*, 2 Moll. 50, 542.

(8) *Beatty v. Beatty*, 2 Moll. 541.

(9) *Boughton v. Boughton*, 2 Ves. Sen. 12 (*vide* Belt's Supp. 250).

(10) *Twort v. Twort*, 16 Ves. 128; *Hole v. Thomas*, 7 Ves. 589.

an injunction between tenants in common against pure equitable waste (1).

30. As between tenants in common, the Court will only interfere to restrain waste in cases of destructive spoliation or waste, and a tenant in common cannot be restrained by injunction, upon the application of his co-tenants, from cutting down and selling trees and timber, where it appears that he is managing the estate according to the proper course of husbandry, and destructive waste cannot be proved (2).

31. After a decree has been made in a partition suit, the Court has jurisdiction to grant an injunction to restrain a defendant from destroying or wasting the property (3). But if there are two tenants in common in possession, and one of them is insolvent and unable to pay his co-tenant his share of the money produced by the sale of the timber cut, the Court will grant an injunction to restrain him from committing waste (4).

32. A jointress will be restrained from committing waste (5). But if it has been covenanted that the jointure shall be of a certain value, which it is not, the Court will refuse the injunction (6). And though a tenant for life, as a jointress, remainder to B. for life, remainder over in tail, is punishable of waste at Law, by reason of the mesne remainder for life, yet she shall be enjoined from committing waste, in a Court of Equity (7).

33. If the under-tenant of a jointress for sixty years if she should so long live, commit waste *sparsim*, so as at Law the estate is forfeited, but insist he has improved the yearly value, and offer to take a lease at the improved rent and to pay for the timber cut, it is doubtful whether the Court will relieve as to the waste (8).

34. A tenant in tail will not be restrained from committing waste (9). Tenant in tail after possibility of issue extinct being

(1) *Hole v. Thomas*, 7 Ves. 589.

(6) *Carew v. Carew*, 1 Eq. C. Abr.

(2) *Arthur v. Lamb*, 2 Dr. & Sm. 400.
428; 12 L. T. (N. S.) 338.

(7) *Tracy v. Tracy*, 1 Vern. 23;

(3) *Bailey v. Hobson*, L. R. 5 Ch. 180.

Tresham v. Gerrard, Tothill, 144;

(4) *Smallman v. Onions*, 3 Bro. C. C. 621.

Bassett v. Bassett, Finch, 189.

(8) *Ligo v. Smith*, 2 Vern. 263.

(5) *Cooke v. Whalley*, 1 Eq. C. Abr. 400.

(9) *Wyld v. Lewis*, 1 Atk. 432.

dispunishable for waste by the Law, has, equally with the tenant for life without impeachment of waste by settlement, an interest and property in the timber (1). And tenant in tail after possibility of issue extinct, having been once tenant in tail in possession with the other donee, and therefore dispunishable for waste, may not only commit waste, but also convert to his or her own use the property wasted, and will, therefore, not be restrained in Equity, except for malicious, or destructive, or equitable waste (2). But a jointress tenant in tail after possibility &c., ought to be restrained from committing wilful waste, she being a jointress within 11 Hen. 7, and by that statute she is restrained from aliening (3).

35. A tenant in tail shall have satisfaction for so much of the value of his inheritance as shall have been received by the tenant in fee in remainder, the produce of waste—committed by him before the tenant in tail, a contingent remainderman, comes *in esse*—in collusion with the tenant for a given number of years if he should so long live *sans* waste (except voluntary), and the executors of the tenant in fee in remainder are liable for the amount so received (4). And the trustees to preserve &c., in such a case, may have an injunction to stay waste before the contingent remainderman comes *in esse* (5). And if there be tenant for life, remainder for life, remainder in fee; if tenant for life commit waste in trees, and afterwards remainderman for life dies, the remainderman in fee may bring an action for waste (6). And where first tenant for life gives leave to a second, who is without impeachment of waste, to cut timber, the Court will grant an injunction, for he ought not to do waste before the estate to which the privilege is annexed comes into possession (7).

(1) *Williams v. Williams*, 15 Ves. 419, 430; *vide Lewis Bowles' Case*, 11 Rep. 80 a; Litt. s. 352; *Abraham v. Bubb*, 2 Freem. 53; *Turner v. Wright*, 2 De G. F. & J. 247.

(2) *Williams v. Williams*, *supra*; *et vide Garth v. Cotton*, Dick. 183; 3 Atk. 751; 1 Ves. Sen. 524, 546.

(3) *Cook v. Winford*, 1 Eq. C. Abr. 221, pl. 2; 3 Madd. 528; *Aston v. Aston*, 1 Ves. Sen. 264, 267; *Abraham v. Bubb*, 2 Freem. 53; 2 Show. 69;

2 Eq. C. Abr. 757; *Williams v. Day*, 2 Ch. Ca. 32.

(4) *Garth v. Cotton*, 3 Atk. 751; 1 Ves. Sen. 524, 546.

(5) *Ib.*

(6) *Ib.*; *et vide Robinson v. Litton*, 3 Atk. 210; *Farrant v. Lovel*, *Ib.* 723.

(7) *Ib.*; *et vide Abraham v. Bubb*, (called in *Garth v. Cotton*, *ante*, *Abraham v. Bubb*), 2 Eq. C. Abr. 757; 2 Freem. Ch. 53; 2 Show. 69.

36. The Court will not restrain a party from cutting timber unless security be given to that party for the full value of all he might have cut in his lifetime, to the intent that he may not be a sufferer by an injunction which at the hearing of the cause may not be thought sustainable (1). The right to an account for waste already committed is incidental to the right to file a bill to prevent further waste (2); though no bill will lie merely for an account for waste done, because the plaintiff has an ample remedy at Law (3). So Equity may forbid by injunction the removal of what has been obtained by past waste (4). So, although Equity will not sustain a bill filed solely to prevent removal of timber wrongfully cut, or for an account of past waste, there being a complete remedy at Law; yet when the bill is also filed to prevent future waste, to avoid multiplicity of suits, the Court will allow an account of, and satisfaction for, what has been done, and to prevent irreparable mischief will enjoin removal of the timber (5). Bills to restrain waste must waive all forfeitures and penalties (6).

37. A Court of Equity will stay equitable waste; for instance, waste of trees for ornament, or belonging to a mansion-house (7). The doctrine of equitable waste applies equally to all cases of estates limited to go in a course of succession, whether that object is effected by creating life interests or estates in fee with executory devises over; but it is a question whether a tenant in fee simple, subject to an executory devise over, can, in the absence of any indication of a contrary intention, be restrained from committing legal waste (8). There will be no injunction against equitable waste unless it has been committed, or is threatened (9). Timber to be ornamental, so as to entitle it to the protection of the Court

(1) *Davis v. Uphill*, 1 Sw. 129, 136.

(2) *Per Bell*, C.J.; *Dennett v. Dennett*, 43 N. H. 503 (Amr.)

(3) *Per Bell*, C.J.; *Dennett v. Dennett*; *United States v. Parrott*, *infra*.

(4) *United States v. Parrott*, 1 M'All. C. C. 271 (Amr.); *Higginbotham v. Hawkins*, L. R. 7 Ch. 676; 41 L. J. (Ch.) 828; 20 W. R. 955; 27 L. T. (N. S.) 328.

(5) *Spear v. Cutter*, 5 Barb. 486 (Amr.)

(6) *Suffolk (Earl) v. Green*, 1 Atk. 450; Mitf. Pl. 162; *Att.-Gen. v. Vincent*, Bun. 192.

(7) *Garth v. Cotton*, 3 Atk. 751, 756.

(8) *Turner v. Wright*, Joh. 740; 6 Jur. (N. S.) 647; 29 L. J. (Ch.) 470; 8 W. R. 387; 6 Jur. (N. S.) 809; 29 L. J. (Ch.) 598; 8 W. R. 675.

(9) *Potts v. Potts*, 3 L. J. (Ch.) 176.

against equitable waste, must be connected with or adjacent to a residence (1). No proceedings for equitable waste can be maintained in respect of trees planted for ornament, as to a house which has formerly been a principal mansion, and having gone into decay, has been restored by a tenant for life (2). And the mere fact that a deviser or settlor may have thought that the house might possibly be rebuilt, is not enough to make the timber ornamental timber (3). A tree or trees may be highly ornamental and yet not be entitled to the protection of the Court as being planted or left standing for ornament. There must be some act of dedication, *ex. gr.*, planting an avenue, cutting a vista, erecting obelisks, &c. Saplings are not within the doctrine, nor are hedge-row trees, or any trees, however ornamental, if not planted also for profit, within the doctrine (4). But timber need not necessarily be ornamental to a house, for the Court protects trees even if they are out of sight of the house (5). And a tenant for life without impeachment of waste will be restrained from cutting timber planted or left standing for ornament, &c., whether ornamental or not so, and the principle has been extended beyond the mansion-house to out-houses and grounds, plantations, vistas, avenues, and all the rides about the estate for ten miles round (6).

38. In the preservation of ornamental timber the protection of the Court is confined to timber planted and left standing for shelter or ornament, and the question whether the protection should be extended to particular timber is, therefore, one of fact, and the determination must depend upon the evidence which can be collected to establish the fact (7).

39. The assignees of a bankrupt tenant for life without impeachment of waste have no right to cut ornamental timber any more than the tenant for life himself, and if they do, the money proceeding from the sale will go to the first person entitled to the

(1) *Micklethwait v. Micklethwait*,
1 De G. & J. 504; 3 Jur. (N. S.) 765,
219; 26 L. J. 721.

(2) *Newdigate v. Newdigate*, 6 Bli.
(N. S.) 734; 2 Cl. & F. 601.

(3) *Newdigate v. Newdigate*, 6 Bli.
(N. S.) 734; *Micklethwait v. Mickle-*
thwait, 1 De G. & J. 504, 527.

(4) *Halliwel v. Philips*, 4 Jur. 607.

(5) *Wellesley v. Wellesley*, 6 Sim.
497.

(6) *Downshire (Marquis) v. Sandys*,
6 Ves. 107, 110.

(7) *Marker v. Marker*, 9 Hare, 1,
18; 15 Jur. 663; 20 L. J. (Ch.) 246.

inheritance, and the assignees will be deprived of the income, even during the life of the tenant for life; for the doctrine and principle of a Court of Equity in such a case is that no man shall obtain a benefit by his own wrong (1). Equitable waste by a tenant for life is a breach of trust, and his assets after his death are answerable for the same (2).

40. Where a tenant for life is felling trees planted for ornament or shelter, the reversioner has an absolute right to restrain him; but when the reversioner stands by and sees him fell the trees, and afterwards applies to the Court, the case becomes one for damages only, and the sole question is, how far the inheritance is actually damaged by the felling of the trees (3). Although a Court of Equity will grant an injunction to restrain a tenant for life from cutting down ornamental timber, irrespective of the question whether or not any damage would be occasioned to the inheritance by such cutting; and unquestionably it is true that the Court will interfere to prevent the cutting down of trees planted for ornament, even although such trees may be (in the opinion of most persons) of the most absurd and fantastic shape, and rather a deformity than an ornament; yet when the ornamental timber has been actually felled, and the reversioner claims damages from the tenant for life in respect of such equitable waste, the amount of damages can only be measured by the damage done to the inheritance, and if no damage has been done, the claim will be dismissed (4).

41. Trustees in whom an estate is vested ought not to cut down ornamental trees alleged to be prejudicial, without first applying to the parties beneficially interested for their assent, or to the Court for its authority, and the *onus* of shewing that the trees are prejudicial lies on the trustees, and they will be restrained, although there may be no wanton destruction on their part, and they may have acted *bonâ fide* (5).

42. It would appear that a Court of Equity will more readily

(1) *Lushington v. Boldero*, 15 Beav. 1; 16 Jur. 140.

(3) *Bubb v. Yelverton* (2), 18 W. R. 1147.

(2) *Ormonde (Marquis of) v. Kynnersley*, 5 Madd. 369.

(4) *Bubb v. Yelverton, Ex parte Hastings*, L. R. 10 Eq. 465.

(5) *Campbell v. Allgood*, 17 Beav. 623.

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act in executing and enforcing a restriction on the exercise of the legal power, in a matter of taste or ornament, where the restriction is connected with a trust, than in the case of equitable waste, in the absence of any such trust (1).

43. The Court, by applying the doctrine of equitable waste, controls and restrains the excessive use of the legal power incident to an estate unimpeachable of waste; considering the excessive use of such a power to be inequitable and unjust; but it exercises that control with reference only to the presumed will and intention of the party by whom the power was created (2); and ornamental timber will be entitled to the protection of the Court though the mansion-house may have been pulled down, where there is a power in the settlement to demise to persons who should be willing to build or to repair houses; for this circumstance tends to sustain the right of those in remainder to have the trees preserved which were originally planted for shelter and ornament; because though the mansion-house which the trees were intended to shelter and ornament may no longer exist, yet there is a possibility of leases being made for the purpose of building houses, which might receive a benefit from the ornament or the shelter afforded by the trees (3).

44. The injunction against cutting ornamental timber is not extended so as to include the words "contribute to ornament" (4). The Court does not protect timber because it is ornamental, but it protects it if it is planted for ornament, whether it is or is not ornamental (5).

45. A rector has no more extensive privileges, nor is there any principle of Law by which a rector can obtain more extensive privileges, as to waste, than an ordinary tenant for life (6); and he will be restrained from felling timber on the rectory lands, save only for necessary repairs (7); as for the repairs of the parsonage-house or chancel, but not for any common purpose (8); and he is entitled to botes for repairing barns and out-houses

(1) *Marker v. Marker*, 9 Hare, 1, 18; 15 Jur. 663; 20 L. J. (Ch.) 246.

(2) *Ib.*

(3) *Morris v. Morris*, 15 Sim. 505; *vide Wellesley v. Wellesley*, 6 Sim. 497.

(4) *Williams v. M^r Namara*, 8 Ves. 70.

(5) *Coffin v. Coffin*, Jac. 70, 71.

(6) *Duke of Marlborough v. St. John*, 5 De G. & Sm. 174.

(7) *Ib.*

(8) *Struchy v. Francis*, 2 Atk. 217.

belonging to the parsonage (1). In respect to waste, a parson or vicar is not to be considered as merely lessee for years, or as tenant for life under a will or settlement; and the Court will not restrain an incumbent from ploughing up meadow infested with moss and weeds, for the purpose of laying it down again in grass, when properly cleaned, on the ground that a law to prevent the amelioration of glebe lands by such means would probably be very injurious to the persons who are, successively from time to time, to enjoy the possession of such lands (2).

46. The purposes for which a vicar is entitled to cut timber are limited to proper and necessary repairs for the vicarage-house, buildings, and premises (3). It is quite clear a vicar is not entitled to cut timber from the glebe, for the purpose of forming a fund to repair dilapidations which he ought never to have allowed to occur. With reference to an expression of Lord Hardwicke, that parsons have been indulged in selling timber and stone where the money has been applied in repairs (4), perhaps the rector or vicar may procure an equivalent amount of other timber by disposing of the first on the spot where he cuts it, and getting some other timber at a more convenient place (5).

47. The Court will grant a writ of prohibition and assistance to the sheriff to prevent a prebendary from committing waste and spoil upon the houses, lands, woods, and timber trees on his prebend (6).

48. The patron is the proper person to institute a suit for the purpose of restraining waste by the incumbent (7), and generally the only proper person. But it would seem that the ordinary may take proceedings to prevent waste by collusion between the patron and incumbent (8). And a Court of Equity will restrain the unlawful opening and working of mines under an agreement between the incumbent and patron (9).

49. The Attorney-General on behalf of the Crown, the patron

(1) *Strachy v. Francis*, 2 Atk. 217.

(5) *Sowerby v. Fryer*, *supra*.

(2) *St. Alban's (Duke of) v. Skipworth*, 8 Beav. 358.

(6) *Acland v. Atwell*, 3 Sw. 499.

(3) *Sowerby v. Fryer*, L. R. 8 Eq.

(7) *Holden v. Weekes*, 1 J. & H. 278; 6 Jur. (N. S.) 1288.

417.

(8) *Ib.*

(4) *Knight v. Moseley*, Amb. 176.

(9) *Ib.*

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of bishoprics, may have an injunction to stay waste against a bishop (1).

50. The Court will grant an injunction to stay waste against the widow of a rector (2).

51. If tenant for life by demise of a bishop's predecessor, commit waste during the vacancy, the successor has an action for it; and this action was not given by the Statute of Marlbridge—if it were so, he might sue for waste done in the time of his predecessor, which he cannot do—but this remedy is the policy of the law (3).

52. A lessee for years of the temporalities of a bishop, under a lease confirmed by the dean and chapter, and without impeachment of waste, will be restrained from felling timber (4).

53. If a mere tenant for life cut timber it belongs, both at Law and Equity, to those who at the time of its being severed from the freehold were seised of the first estate of inheritance, and the property becomes vested in them (5). Mines, as well as timber trees, are a part of the inheritance, and no one has power over them but such as has an estate of inheritance limited to him (6).

54. A tenant for life has a right to what may be sufficient for repairs and botes; but he is not entitled to any share of the money arising from the sale of decaying timber, and timber when severed by the act of God, as by tempest, or by accident, or by a trespasser and by wrong, belongs to the first owner of the inheritance; but decaying timber, if for the defence and the shelter of the seat or house, or for ornament, must not be cut down (7). If a tenant for life cut timber which is ripe for cutting, but not decaying or overcrowding, the act is tortious, and the right of the remainderman accrues (8).

(1) *Knight v. Moseley*, Amb. 176.

(2) *Hoskins v. Featherstone*, 2 Bro. C. C. 552.

(3) *Garth v. Cotton*, 3 Atk. 751, 755.

(4) *Winchester (Bishop of) v. Wolgar*, 3 Sw. 493.

(5) *Whitfield v. Bewit*, 2 P. Wms. 240; *vide Bewick v. Whitfield*, 3 P. Wms. 267; *Rolt v. Somerville (Lord)*,

2 Eq. Ca. Abr. 759, pl. 8; *Garth v. Cotton*, 3 Atk. 751; and 1 Ves. Sen. 524, 546; S. C. Harg. Co. Litt. 218 b, note 2.

(6) *Whitfield v. Bewit*, 2 P. Wms. 242.

(7) *Bewick v. Whitfield*, 3 P. Wms. 267.

(8) *Scagram v. Knight*, 36 L. J. (Ch.) 918.

55. Timber cut down by a tenant for life having a vested remainder in fee, while contingent estates are in expectancy, and the produce of the sale thereof, belong to the party who shall appear entitled at the death of the tenant for life. The tenant for life will not be allowed to take advantage of his own wrong by taking the timber so cut (1). A bill by a landlord for an account of waste in cutting timber by a tenant in his lifetime, lies against the tenant's executors; and an account will be granted with an injunction as to waste by the executors (2).

56. If a devisee for life of lands incumbered with debts cut down timber from the estate, he will be decreed to pay a rateable portion thereof to a devisee in fee in remainder (3).

SECT. 13. *Mortgages—Judgments—Annuities.*

1. If a party contest the amount admitted by other incumbrancers to be due to the first mortgagee, he cannot take advantage of a stipulation by the first mortgagee not to sell within a certain time (4). But if a puisne incumbrancer's offer to pay off the first mortgagee has been declined, the mortgagee will be restrained from transferring the first mortgage and parting with the legal estate and deeds; and though if a plaintiff comes forward on a bill to redeem and to restrain a transfer, he is bound to make out a *prima facie* case (5); yet if he does so, and he is an incumbrancer on the property, the Court will not, pending the suit, say that the defendant might sell the property under the power of sale, and make a conveyance and transfer of the legal estate; for that would be determining on an interlocutory motion, that the plaintiff had no right; and if he went on and established his right to redeem, it would be impossible for him to obtain any benefit at the hearing, as the purchaser under the execution of the power would get a title to the estate;

Mortgages.

(1) *Williams v. Bolton (Duke)*, 1 Cox, 72; *et vide Garth v. Cotton*, 3 Atk. 751; 1 Ves. Sen. 524, 546.
(2) *Fishmongers' Co. v. Beresford*, Beat. 607.
(3) *James v. Hales*, 2 Vern. 267; Prec. Ch. 44.
(4) *Cockel v. Bacon*, 16 Beav. 158.
(5) *James v. Biou*, 3 Sw. 237.

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in such a case, the principle of protection of the property pending litigation ought to be applied, so as to restrain any dealing with the legal estate until the rights can be determined (1). A mortgagee of a testator will be restrained from exercising his power of sale, where he has threatened to do so unless the executor of the testator will also redeem a mortgage made by a devisee of the testator (2). The principle upon which the Court restrains persons filling a fiduciary character from having any dealings for their benefit, does not apply to the case of mortgagor and mortgagee (3). Although the Court will not, unless under special circumstances, grant an injunction to restrain a mortgagee from selling under a power in the mortgage deed, it is otherwise where there is a trustee for sale, and he proceeds precipitately and without notice to both parties (4). A sale of lands will be restrained on an interlocutory motion, where, although the conveyance is absolute on its face, there are probable grounds of belief that it was intended only as a mortgage (5).

2. The Court will, upon an interlocutory application, restrain a mortgagee from enforcing his power of sale under the mortgage deed, where he does not deny that he has committed a breach of trust (6).

3. Where there are several equitable incumbrancers, one of whom by greater diligence, though later in date, gets, in aid of his equitable incumbrance, a legal right, the Court will not disturb him in his possession (7).

4. A mortgagee has a right to proceed on his mortgage and bond at the same time; but a mortgagee will be restrained from proceeding at Law upon a bond, his collateral security, unless the mortgagor is secure of his title deeds being delivered up (8). But it is no ground for restraining a mortgagee from enforcing his security at Law, that he has contracted to buy from the mortgagor another estate, from the purchase money of which, the

(1) *Rhodes v. Buckland*, 16 Beav. 212.

(2) *Whitworth v. Rhodes*, 20 L. J. (N. S.) Ch. 105.

(3) *Dobson v. Laud*, 8 Hare, 221.

(4) *Anon.*, 6 Madd. 10.

(5) *Peeler v. Barringer*, 1 Wins. (N. C.) No. 2 (Eq.) 5 (Amr.).

(6) *Merest v. Murray*, 14 L. T. (N. S.) 321.

(7) *Bates v. Brothers*, 17 Jur. 1174.

(8) *Schoole v. Sall*, 1 Sch. & Lef. 176.

mortgage debt is to be deducted (1). But although a mortgagee, as such, has a right to all his remedies, yet where, by contracting to purchase mortgaged premises, he has made his character of mortgagee conditional, depending on whether he is purchaser or mortgagee, a Court of Equity will enjoin him from proceeding at Law (2). The assignee of a mortgagee cannot stand in any different character, or hold any different position, from that of the mortgagee himself, although the mortgagor may not have been a party to the assignment; and it is also clear that every mortgagor has the right to have a re-conveyance of the mortgaged property upon payment of the money due upon the mortgage, and that every mortgagee is charged with the duty of making such re-conveyance upon such payment being made. This, indeed, being no more than the necessary result of the relative positions of the parties, the mortgage being only a security for the debt. If, therefore, a mortgagee, having, besides the property mortgaged, promissory notes made by the mortgagor as collateral security for his debt, transfer the mortgage without assigning the collateral securities, he will be restrained from proceeding at Law to recover the amount of one of his notes, pending a suit by the mortgagor to redeem and settle the equities of the parties; for the mortgagee is not entitled to sever the debt from the security (3). A mortgagor is entitled to restrain an action against himself to recover the mortgage money upon a collateral security, upon payment into Court of the sum which appears to be really due upon the mortgage (4). After foreclosure and sale an action by the mortgagee re-opens the foreclosure; therefore the mortgagee should have time to get back the estate and tender a re-conveyance, and the mortgagor to redeem (5). But if a mortgagee who has sold the estate, has taken possession a considerable time before the filing of a bill to redeem and stay an action on a collateral security, and the balance is inconsiderable, the Court will grant a perpetual injunction to restrain the action—for instance, an action on a bond given as a collateral security (6).

(1) *Pell v. Stevens*, Coop. temp. Brougham, 266; 2 My. & K. 334;
4 Tyrw. 6.

(2) *Drummond v. Pigou*, 2 My. & K. 168.

(3) *Walker v. Jones*, L. R. 1 P. C. 50.

(4) *Taylor v. Waters*, 1 My. & Cr. 266.

(5) *Perry v. Barker*, 8 Ves. 527;

13 Ves. 198.

(6) *Ib.*

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5. A Court of Equity will not restrain a mortgagor in possession from felling timber growing upon the mortgaged estate, unless, without the timber, the security is scanty or insufficient (1). And the injunction may be extended to cutting down underwood contrary to the usual course of husbandry, but not to underwood generally, although the mortgagor is insolvent (2). But if the security is sufficient a Court of Equity will not grant an injunction merely because the mortgagor cuts, or threatens to cut, timber; there must be a special case made out before such a Court will interpose. But the difficulty consists in discovering what is meant by a sufficient security; and it would seem that the question which must be tried is, whether the property the mortgagee took as a security is sufficient in this sense—that the security is worth so much more than the money advanced—that the act of cutting timber is not to be considered as substantially impairing the value, which was the basis of the contract between the parties at the time it was entered into (3). Though a mortgagee in fee may commit waste at Law, yet he shall never do so in Equity, and will be restrained from cutting down timber, unless the security is defective (4). But if a mortgagee in possession commit waste by cutting down timber, and does not apply the money arising by sale of the timber in sinking the interest and principal of his mortgage, a Court of Equity will grant an injunction to stay the waste (5). A mortgagee will not be allowed to retain the user of easements obtained by means of a trespass committed by the mortgagor; but the mortgagee, not having himself committed the trespass, will not be ordered to reinstate the property so as to destroy the easements (6).

6. A mortgagor who redeems in a suit will be quieted in possession, and shall have a re-conveyance from the parties entitled under a settlement of the mortgaged estate made by the mortgagee (7).

(1) *King v. Smith*, 2 Hare, 239, 243-4; *Hippesley v. Spencer*, 5 Madd. 422; *Usborne v. Usborne*, Dick. 75.

(2) *Lumphy v. Harrison*, 1 Jac. & W. 581.

(3) *King v. Smith*, 2 Hare, 239, 243-4.

(4) *Withrington v. Cotesworth*, Sel. Cha. Ca. 31.

(5) *Farrant v. Lovel*, 3 Atk. 723.

(6) *Powell v. Allen*, 4 K. & J. 343.

(7) *Chapman v. Duncombe*, 2 Vern. 142.

7. Where a mortgagor pays off the mortgage and takes a re-assignment of the property, he must carry out any contract for a sale thereof made by the mortgagee under a power of sale in the mortgage deed. The party claiming under the contract has the same right to have the contract completed against the mortgagor as he has against the mortgagee (1).

8. A mortgagee is a trustee for the mortgagor and those claiming under him of the surplus of the purchase-money that may remain after a sale of the mortgaged property; and the Court will restrain any payment thereof that will prejudice the rights of those entitled thereto (2).

9. Judgment creditors under an execution take the precise interest and no more which the debtor possesses in the property seized, and a sale of the property seized—for instance, lands—being a sale by the law and not by the debtor, such judgment creditors will take such property subject to any incumbrances legal or equitable that it was subject to in the hands of the debtor (3).

10. Although a judgment may not be enforceable for a given period, yet a Court of Equity will in the meantime restrain trustees from paying to the debtor, a tenant for life, the income arising from the property affected, until the charge can be enforced (4). And a judgment creditor, who has sued out an elegit without effect, is entitled to equitable relief, and a Court of Equity will interfere and protect the property charged by a judgment from destruction (5).

11. If a judgment is, in point of fact, satisfied, and a Court of Law will not, in point of form, allow a judgment to be set off against such satisfied judgment; it is right that it should and it will be done in Equity (6). But a Court of Equity has no jurisdiction to relieve a plaintiff against a judgment at Law, where the case in Equity proceeds upon a ground equally available at Law and in Equity; the plaintiff must establish some special equitable ground for relief (7).

(1) *Gutteridge v. Fletcher*, 13 W. R. 540. *Canada Railw. Co.*, L. R. 1 P. C. 64; 12 Jur. (N. S.) 34.

(2) *Robinson v. Hedger*, 13 Jur. 846; 17 Sim. 183; *Thornton v. Finch*, 4 Giff. 515. (4) *Yescombe v. Landor*, 5 Jur. (N. S.) 780.

(5) *Partridge v. Foster*, 34 Beav. 1.

(3) *Wickham v. New Brunswick and* (6) *Williams v. Davies*, 2 Sim. 462.

(7) *Harrison v. Nettleship*, 2 My. & K. 423.

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And though a Court of Equity deals with a judgment at Law according to the equities, if the equities are available at Law in the action, the Court will not interfere (1).

12. A person who, without consideration, confesses a judgment for the purpose of thereby withdrawing his property from the demands of his creditor, has no equity for an injunction to restrain the conusee from proceeding to levy the amount of the judgment, although it never was used for the purpose for which it was confessed (2).

13. An equitable mortgagee of lands is entitled in Equity to enforce his charge, in priority to a creditor of the mortgagor, who, without notice of the equitable mortgage, has subsequently thereto recovered judgment against the mortgagor, and obtained actual possession of the lands by writ of elegit and attornment of the tenants (3).

Annuities.

14. The Court of Chancery has a concurrent jurisdiction with Courts of Common Law in annuity cases, and therefore can entertain a suit to raise the arrears of an annuity, though the deed granting the annuity contain a clause enabling the grantee to restrain, and the bill contain no averment of any substantial difficulty to prevent the plaintiff availing himself of this remedy (4).

15. If an annuity is secured by a covenant and warrant of attorney, and the arrears have been paid, a Court of Equity will not restrain the executors of the grantor from paying his simple contract debts, until they have set apart a fund to answer the future payments, unless a case of past or probable misapplication of assets is made out (5).

16. A grantor of annuities secured on lands who conceals prior incumbrances will be restrained from receiving the rents; it is perfectly clear that he ought not to be permitted to receive any part of them (6).

17. If a surety under an annuity deed redeem an annuity after

(1) *Butts v. Matthews*, 5 L. J. (N. S.) Ch. 134.

(2) *McCurdy v. Martin*, 5 Ir. Eq. Rep. 515.

(3) *Whitworth v. Gauguin*, 3 Hare, 416.

(4) *Manley v. Hawkins*, 1 D. & Wal. 363.

(5) *Reed v. Blunt*, 5 Sim. 567.

(6) *Dalmer v. Dashwood*, 2 Cox, 378.

the bankruptcy of the grantor, he is entitled to the benefit of the grantee's proof under the bankruptcy, and to proceed by action against the grantor for the arrears of the annuity subsequent to the bankruptcy (1).

SECT. 14. *Vendor and Purchaser, Specific Performance.*

1. A Court of Equity will not refuse to decree specific performance of an agreement, although the plaintiff may have a concurrent remedy in damages, or may have entered into a negotiation for a money compensation which has failed, and will, if necessary, grant an injunction to enforce the specific performance (2). In cases of mistake by both of the parties to a contract, as to the subject-matter of the contract, no injunction will be granted with reference to such subject-matter, since neither party has, in such cases, any right to require specific performance of the agreement (3).

2. A vendor is not entitled to an injunction to restrain a purchaser from buying another estate, on the ground that it will incapacitate him from completing his first purchase (4). The fact that a contract has been entered into for the purchase of land, is not sufficient to entitle the purchaser to an injunction in respect of the subject-matter of the contract, before the title has been accepted. By not accepting the title, the purchaser, in effect, says that he does not pledge himself to accept a conveyance (5). A Court of Equity will, in a suit for specific performance by a vendor, restrain an action by the purchaser to recover the deposit; such a Court is the proper tribunal to try a question of title (6).

3. If the subject-matters, the term of years to be granted, and the rent, are certain, uncertainties in the subsidiary part of an agreement are not sufficient to prevent a tenant from having the agreement specifically performed, and the lessor will be restrained

(1) *Watkins v. Flanagan*, 3 Russ. 421; S. C. 1 G. & J. 199.

(2) *Greene v. West Cheshire Railw. Co.*, L. R. 13 Eq. 44; 41 L. J. (Ch.) 17.

(3) *Butterworth v. Walker*, 13 W. R. 168; 11 L. T. (N. S.) 436.

(4) *Syers v. Brighton Brewery Co.*, *Wright v. Brighton Brewery Co.*, 13 W. R. 220.

(5) *Heath v. Maydew*, 11 L. T. (N. S.) 473; 13 W. R. 199.

(6) *Kell v. Nokes*, 32 L. J. (N. S.) Ch. 785.

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from attempting to recover possession by an action of ejectment (1). So of a parol agreement where the rent and the term are certain, and the lessee has been let into possession, and there is a memorandum of the terms of the agreement (2). Where an original agreement has been subsequently varied, unless there be certainty as to those variations as affecting the original agreement, so that both together should form one consistent agreement, the jurisdiction of specific performance cannot be applied, and the right to an injunction must depend on the right to specific performance (3). Upon an agreement by an original lessor with an intended sub-lessee, to grant such a lease as the original lessee is entitled to, the intended sub-lessee cannot restrain the original lessor from making a lease to others of the premises, where the original lessee has not satisfied the conditions of his original contract; the intended sub-lessee in such a case has no equity against the original lessor, the only right he has is the right to such a lease as the original lessee would have been entitled to claim (4).

4. If an agreement be of a personal nature on both sides, the benefit of it is not assignable by either party without the consent of the other, and the Court will not restrain a violation of the agreement by a person acting under the authority of one of the parties, at the suit of an assignee of the other party, claiming under an assignment in which the first-mentioned party did not concur (5). If a contract contain obligations of a personal character, a Court of Equity will not restrain any obstruction that may be offered to prevent the carrying out the contract (6). Where the terms of a contract are such that the Court cannot superintend, so as to secure the performance by a plaintiff of his part, it will not decree specific performance; and if, on non-performance by a plaintiff, both parties cannot have equal justice, it will not, in the absence of an express negative covenant, and where the contract

(1) *Parker v. Taswell*, 4 Jur. (N. S.) 183, 1006; 27 L. J. (N. S.) Ch. 812.

(2) *Pain v. Coombs*, 3 Sm. & Giff. 449; 3 Jur. (N. S.) 307; 1 De G. & J. 24.

(3) *Paris Chocolate Co. v. Crystal Palace Co.*, 3 Sm. & Giff. 119.

(4) *Anon.*, 1 L. J. (Ch.) 25.

(5) *Stevens v. Benning*, 6 De G. M. & G. 223; 1 Jur. (N. S.) 74.

(6) *Knight v. Burgess*, 33 L. J. (Ch.) 727; 10 L. T. (N. S.) 90; *Stocker v. Brocklebank*, 3 Mac. & G. 256; *Mair v. Himalayan Tea Co.*, 11 Jur. (N. S.) 1013.

cannot be split into separate independent portions, and the negative part enforced, grant an injunction to restrain acts the doing of which is inconsistent with the maintenance of the contract (1). So a Court of Equity will not restrain a defendant from violating his part of an agreement, where the agreement is such, that it could not enforce specific performance by the plaintiff of his part of it (2). Nor will such a Court entertain a bill for specific performance of an agreement which contains terms that cannot be enforced against the plaintiff, where the effect of a decree would be, that, the plaintiff refusing to perform his part of the contract, the defendant could not be restored to his former position (3). And the Court will not interfere by injunction to restrain the violation of an agreement of which, from the nature of the subject, as, for instance, imparting the secret of an invention which has been the subject of a patent long since expired, there can be no decree for specific performance (4). So the Court will not restrain a defendant from acting in violation of an agreement, where it cannot compel him to perform his agreement, and therefore cannot compel specific performance of the agreement (5). And the subject-matter of a contract will not be protected by an injunction, unless the plaintiff is entitled to specific performance (6). The difference in the cases where a negative term of an agreement has been enforced by injunction, although the rest of the agreement could not have been specifically performed in Equity, is that the Court could at any time, upon a breach of any other term in the agreement, restore the parties to their former position, or nearly so, by dissolving the injunction. The ground upon which a Court of Equity goes in enforcing by injunction a negative term in an agreement, the positive terms in which cannot be enforced by decree for specific performance, is, that the injunction is dependent upon the plaintiff

(1) *Peto v. Brighton, Uckfield, and Tunbridge Wells Railw. Co.*, 11 W. R. 874; 1 H. & M. 468; 32 L. J. (Ch.) 677; 9 L. T. (N. S.) 227; *vide Lumley v. Wagner*, 1 De G. M. & G. 604; *De Mattos v. Gibson*, 4 De G. & J. 276; *Webster v. Dillon*, 3 Jur. (N. S.) 432; 5 W. R. 867.

(2) *Hills v. Croll*, 1 Coop. C. C. 84.

(3) *Stocker v. Wedderburn*, 3 K. & J. 393; 26 L. J. (Ch.) 713.

(4) *Newbury v. James*, 2 Mer. 446.

(5) *Baldwin v. Society for the Diffusion of Useful Knowledge*, 9 Sim. 393; *Clarke v. Price*, 2 Wils. 157; *vide Kernot v. Potter*, 3 De G. F. & J. 447.

(6) *Geiger v. Green*, 4 Gill. 472 (Amr.).

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performing his part of the contract, and will be dissolved on his failing to do so (1). Although a Court of Equity will not restrain a party from discontinuing to do a thing, if it would be in effect ordering the thing to be done, where that thing is of a personal nature, as, for instance, carrying on the business of an innkeeper; yet it can restrain him from doing, or permitting to be done, any act which will put it out of the power of the party to do the thing he has covenanted to do (2). And although an agreement contain no express condition not to do an act, which if done will prevent a party who has contracted to do a thing from doing that thing, yet a Court of Equity will restrain him from doing that act, and that, notwithstanding it cannot enforce the performance of the contract, as to the thing which the party agreed to do (3). But when the principal portion of an agreement is incapable of specific enforcement by the Court, and it appears that the entire agreement has been broken, no relief will be granted in respect of a negative clause therein contained, which is merely incidental to the general relief sought, although such clause might have been enforced had it stood alone, or had the agreement been in other respects still subsisting and undisputed (4).

5. In considering whether to grant or to refuse an injunction to restrain a breach of a particular clause of an agreement, the Court will look to the substance of the act to be performed, and not merely to the presence or absence of negative words (5).

6. Acts in violation of a contract, or a term therein, will be restrained (6); and that, although there be no evidence of any actual damage done, and it is no answer to say that the acts proposed will not be injurious, or even to prove that they will be beneficial to the plaintiff (7).

(1) *Stocker v. Wedderburn*, 3 K. & J. 393; 26 L. J. (Ch.) 713; *Lumley v. Wagner*, 5 De G. & Sm. 485; 1 De G. M. & G. 604; *et vide Great Northern Railw. Co. v. Manchester, Sheffield, and Lincolnshire Railw. Co.*, 5 De G. & Sm. 138; *Rolfe v. Rolfe*, 15 Sim. 88; 1 Coop. C. C. 87, n.

(2) *Hooper v. Brodrick*, 11 Sim. 47.

(3) *Webster v. Dillon*, 3 Jur. (N. S.) 432; 2 W. R. 867.

(4) *Brett v. East India and London Shipping Co.*, 2 H. & M. 404.

(5) *Wolverhampton and Walsall Railw. Co. v. London and North-Western Railw. Co.*, 43 L. J. (Ch.) 131.

(6) *Rankin v. Huskisson*, 4 Sim. 13.

(7) *Dickenson v. Grand Junction Canal Co.*, 15 Beav. 260.

7. The Court will not restrain a breach of an agreement where a Court of Common Law has decided that the word "penalty" in the agreement means liquidated damages, and the plaintiff has recovered a sum by way of such damages, and therefore has no right of action remaining—for that would be to restrain the defendant from doing that act for which he has paid the price of doing (1).

8. Where an agreement has been long acted upon, as, for instance, the permitting the use of the effects of one partnership by another partnership, the Court will not interfere by injunction (2). If the effect of an agreement is to constitute a party a partner, as, for instance, in a patent, the Court will restrain the other partner from interfering in the management of the business (3).

9. A Court of Equity will not grant an injunction to specifically enforce an agreement which is founded on a fraud upon the public (4).

10. Equity will restrain alterations in the subject-matter of an agreement—as, for instance, a house agreed to be leased—where there are circumstances that would probably prevent a specific performance, namely, surprise, the effect of fraudulent misrepresentation, and concealment, or the nature of the alterations changing the nature of the subject-matter (5).

11. If there is a question to be decided at the hearing of the cause, upon which will depend the circumstance whether the Court will grant specific performance, it will grant an injunction in aid of the bill for specific performance (6). And so also if it is too hazardous to say there is not a fair and reasonable question whether a contract may not be specifically executed, it will grant such an injunction (7).

12. A Court of Equity will interfere by injunction to prevent a party availing himself in any manner of a title arising out of a

(1) *Sainter v. Ferguson*, 1 Mac. & G. 286; 1 H. & T. 383. (5) *Bonnett v. Sadler*, 14 Ves. 526.

(2) *Glassington v. Thwaites*, 1 S. & S. 124. (6) *Browne v. Warner*, 14 Ves. 156, 409; *Price v. Assheton*, 1 Y. & Coll. 82; *Attwood v. Barham*, 2

(3) *Blackford v. Hawkins*, 1 L. J. (Ch.) 141. Russ. 186.

(4) *Oldham v. James*, 14 Ir. Ch. Rep. 81. (7) *Drewe v. Hanson*, 6 Ves. 675.

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violation of right, or breach of contract or confidence. And the cases in which such a Court refuses to interfere by injunction until the legal right is established by Law, have no application to cases in which the Court exercises an original and independent jurisdiction to prevent a wrong arising from a violation of right, or breach of contract or confidence (1). So such a Court will restrain a person from divulging a secret—as, for instance, in the preparation of a medicine—which has been obtained by a breach of trust and confidence (2).

13. Although on a bill for specific performance of an agreement to sell, the Court will not in general restrain the owner from dealing with his property, since a different doctrine would operate to control the rights of ownership, although the agreement might be such as could not be performed; yet under some circumstances the Court will restrain an owner from so doing, as, for instance, from surrendering copyholds to persons other than the purchaser, after delivery of possession and receipt of part of the purchase-money (3); or from conveying the legal estate, as the plaintiff might be put to expense by the necessity of making another party, when the cause might be just ready for hearing (4); or from letting (5). And vexatious alienations *pendente lite* will be restrained (6). The Court will restrain the sale of property upon an agreement made by defendants which would be a violation of the duty of the defendants to the plaintiff (7). It is the law, consistently with authority and principle, that, however large may be the power of trustees under their trust deed to introduce conditions limiting the title, and other special conditions which have, or are calculated to have, a depreciatory effect on the sale, they are bound to exercise them in a reasonable and proper manner, that they must not rashly or improvidently introduce a depreciatory condition, for which there is no necessity or justification, and the Court will, at the suit of a *cestui que trust*, restrain the trustees and

(1) *Prince Albert v. Strange*, 1 Mac. & G. 25; H. & T. 1.

(2) *Yovatt v. Winyard*, 1 J. & W. 394; *Morison v. Moat*, 21 L. J. (Ch.) 248; 9 Hare, 241.

(3) *Spiller v. Spiller*, 3 Sw. 556, 557.

(4) *Echcliff v. Baldwin*, 16 Ves. 267.

(5) *Turner v. Wright*, 4 Beav. 40; *vide Curtis v. Marquis of Buckingham*, 3 V. & B. 168.

(6) *Daly v. Kelly*, 4 Dow. 440.

(7) *Hawes v. James*, 1 Wils. 2.

a purchaser from completing a sale made under such conditions (1). So it will restrain the re-selling of premises under the conditions of a prior sale, where the plaintiff has a right to specific performance of the contract, freed from a liability—for instance, to an easement—attempted to be forced upon him by the vendor (2). But although, where there is a contract for the sale of land, a Court of Equity will restrain the owner of the land from dealing with it until a suit for specific performance has been disposed of, yet if there is a serious question whether any contract exists, and the claim of a plaintiff for specific performance is doubtful, such a Court will act upon the consideration of the comparative inconvenience which may arise from the granting or withholding the injunction, and from the consideration that the granting the injunction would, in case of the plaintiff ultimately failing, be more injurious to the vendor than the refusal of it would be to the purchaser, in the event of his ultimately succeeding (3).

14. In Equity it is not necessary for the alienation of existing property that there should be a formal deed of conveyance, and a contract to transfer the property, given for valuable consideration, provided it is capable of being the subject of a decree for specific performance, passes it at once, and the vendor becomes a trustee for the vendee. This rule applies to personal property as well as to real estate; and such a contract, if made with respect to the sale or mortgage of future acquired property, being capable of specific performance, transfers the beneficial interest in the property, as soon as it is acquired, to the vendee or mortgagee, who may have an injunction to restrain its removal (4).

15. A Court of Equity will not, upon an interlocutory motion, restrain one of the parties to a contract, from an act for which, if wrongful, the plaintiff can obtain compensation in damages at the hearing of the cause, and where the contract, is one of which specific performance cannot be decreed as against the plaintiff (5).

(1) *Dance v. Goldingham*, L. R. 8 Ch. 902, 909; 21 W. R. 761; 42 L. J. (Ch.) 777; 29 L. T. (N. S.) 166. (4) *Holroyd v. Marshall*, 10 H. L. C.

(2) *Russell v. Harford*, L. R. 2 Eq. 507. 191.

(3) *Hadley v. London Bank of Scotland*, 3 De G. J. & S. 63; 11 Jur. (N. S.) 554; 13 W. R. 978; *vide Gar-* (5) *Garrett v. Banstead and Epsom Downs Railw. Co.*, 13 W. R. 878; 4 De G. J. & S. 462.

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16. A Court of Equity will support an agreement, though by parol, followed by long enjoyment, upon the principle on which such a Court supports family arrangements, as, for instance, an agreement for a partition by parties apparently, but doubtfully entitled as tenants in common, who are in fact, respectively tenant in tail and tenant in tail in remainder, and will restrain proceedings at Law in violation of such an agreement (1).

17. Although a Court of Equity has jurisdiction to entertain a suit for specific performance of an award, and to grant an injunction for the purpose of aiding in carrying out the award, yet that relief cannot be granted in the case of an award, any more than it can in the case of an agreement, if the Court cannot give full relief to both parties (2). In all cases where the Court interferes by way of enforcing specific performance of an engagement by way of contract or agreement—for instance, in a lease—the jurisdiction it exercises by injunction is in an eminent degree discretionary, and ought to be guided and measured by what substantial justice shall require as between the parties (3).

- (1) *Neale v. Neale*, 1 Keen, 672; 151; *vide* 12 Jur. (N. S.) 874, n.
Ib. 684, n. (3) *Low v. Innes*, 4 De G. J. & S. 286, 290.
(2) *Blackett v. Dates*, L. R. 1 Ch. 117; 2 H. & M. 610; 12 Jur. (N. S.)

CHAPTER II.

THE DOCTRINES AND PRINCIPLES AS APPLICABLE TO PERSONAL PROPERTY.

SECT. 1. *Patents.*

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1. The jurisdiction of a Court of Equity with reference to patents is founded upon legal rights, the plaintiff coming into the Court on the assumption that he has the legal right, and the Court granting its assistance upon that ground. When a party applies for the aid of the Court, the application for an injunction is made either during the progress of the suit or at the hearing, and in both cases great latitude and discretion are allowed to the Court in dealing with the applications. When the application is for an interlocutory injunction, several courses are open. The Court may at once grant the injunction *simpliciter* without more—a course which, though perfectly competent to the Court, is not very likely to be taken where the defendant raises a question as to the validity of the plaintiff's title; or it may follow the more usual and more wholesome practice, in such a case, of either granting an injunction until the plaintiff has established his legal title, or of requiring him first to establish his legal title, and suspending the grant of the injunction until the result of the legal investigation has been ascertained, the defendant in the meantime keeping an account. Which of these several courses ought to be taken must depend entirely upon the discretion of the Court, according to the case made. And when the cause comes to a hearing the Court has also a large latitude left to it, and a case might then arise in which, even at that stage, the Court might be of opinion that the injunction might properly be granted without having recourse to a trial of the legal right. The conduct and dealings of the parties, the frame of the pleadings, the nature of the patent right and of the

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evidence by which it is established—these and other circumstances might combine to produce such a result, although this is certainly not very likely to happen, and probably there is not a case in which it has happened. Nevertheless, it is a course unquestionably competent to the Court, provided a case were presented which satisfied the mind of the judge that such a course, if adopted, would do justice between the parties; and, again, the Court may, at the hearing, do that which is the more ordinary course, it may retain the bill, giving the plaintiff the opportunity of first establishing his legal right. And there still remains a third course, the propriety of which must also depend upon the circumstances of the case—that of at once dismissing the bill (1). If the validity of the patent is not clear, nor the evidence of exclusive possession satisfactory, an injunction will be refused until the validity has been tried and determined (2). So, where after a verdict, and pending a rule *nisi* for a new trial, the legal right is still undecided, although a patent may be of long standing; yet, if from the nature of the alleged invention or the conflicting evidence of its novelty, its validity appears to be doubtful, the Court will not grant an injunction until the legal title has been established (3). In every case where interlocutory injunctions are applied for, it is important to consider what it is that the Court can most satisfactorily do provisionally. Where an injunction is asked to restrain the infringement of a patent, the Court has occasion to

(1) *Bacon v. Jones*, 4 My. & Cr. 433, affirming S. C. *sub. nom. Bacon v. Spottiswoode*, 1 Beav. 382; 3 Jur. 476, 994. By “The Chancery Regulation Act, 1862” (Rolt’s Act), it is enacted that all questions of law or fact, on the determination of which the title to relief or remedy in Equity depends, shall be determined by or before the Court of Chancery; but, where questions of fact may be more conveniently tried at assizes, issues may be directed by the Court of Chancery. See also the Supreme Court of Judicature Acts, 1873 and 1875, by which “The High Court of Justice,” consisting of five divisions,

and constituted of the then Courts of Chancery, Queen’s Bench, Common Pleas, Exchequer, Admiralty, Probate, Divorce and Matrimonial Causes, Bankruptcy, Common Pleas at Lancaster, Pleas at Durham, Commissions of Assize, Oyer, Terminer, and Gaol delivery, and “Court of Appeal,” constituting the Supreme Court of Judicature, created by those Acts, are empowered to administer both Law and Equity, ss. 3, 4, 16, 18, 24, *et passim*.

(2) *Collard v. Allison* (1), 4 My. & Cr. 487.

(3) *Ib.*; *vide Curtis v. Cutts*, 8 L. J. N. S. (Ch.) 184; 3 Jur. 34.

consider, first, the validity of the patent, and, secondly, the fact of the infringement; and where those two facts are established, it is within the power, as it is the duty of the Court to grant an injunction. There are many cases in which it is not clear either that the patent is legally valid, or that it has been infringed, and it depends on the degree of doubt which exists on these questions, whether the Court will grant an interim injunction. In such cases it will cautiously consider the degree of convenience and inconvenience to the parties, by granting or not granting the injunction. These things are to be carefully considered. The right between the parties is a legal right, and being a legal right, a Court of Equity, in cases where the matter is doubtful, is naturally anxious to arrive at a decision upon the legal right before it interferes to prevent a party from exercising his *primâ facie* rights. According to the doubt which may exist in the mind of the Court upon the facts, and according to the degree of inconvenience to the parties, the Court, not thinking fit to grant the injunction at the time, may take one of several courses. It may either refuse to grant the injunction simply, or it may refuse it on the terms of the party undertaking to keep an account, or it may direct the motion to stand over on the terms of the plaintiff proceeding to establish his legal right (1). The question whether the Court will interfere to protect a patentee before he has established his right at Law, or will suspend its interference until the right at Law has been established, appears to depend upon very simple principles. It is part of the duty of a Court of Equity to protect property pending litigation; but when it is called upon to exercise that duty, the Court requires some proof of title in the party who calls for its interference. In the case of a new patent this is wanting. The public, whose interests are affected by the patent, have had no opportunity of contesting the validity of the patentee's title, and the Court therefore refuses to interfere until his legal right has been established. But in a case where there has been long enjoyment under the patent (the enjoyment, of course, including the use), the public have had an opportunity of contesting the patent, and the fact of their not having done so successfully, affords at least *primâ facie* evidence that the title of the patentee is good, and the Court therefore

(1) *Bridson v. McAlpine*, 8 Beav. 229.

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interferes before the legal right is established (1). Still in an infringement of a recent patent, it is not a matter of course to require a plaintiff to establish his legal right, but the Court will have regard to the whole case made on the pleadings and by the evidence (2). But where sufficient possession is made out, a doubt as to the validity of the patent will not necessarily prevent an injunction. The Court will look at the circumstances, and the comparative inconvenience or loss to be occasioned by granting or withholding it (3). So, where a Court of Equity, having heard a case on full proofs, is well satisfied of the originality of an invention, the regularity of the patent, and the fact of infringement, it will not send the case to a jury prior to granting a perpetual injunction; especially if the questions in the case, though questions of fact, are such as the Court can decide upon the testimony of men of science as well as, or better than, a jury, and where a jury trial would be long, costly, or troublesome (4).

2. But before a patentee can have an injunction he must shew an exclusive enjoyment long enough to justify the presumption of a right, or an incontestible right (5). However, the Court will grant an injunction upon the ground of possession by the patentee, that is to say, a reasonably long and undisputed possession under a patent, until the right can be tried, though subject to considerable doubt (6). Where the Crown on behalf of the public grants letters patent, the grantee entering into a contract with the Crown, the benefit of which contract the public are to have, and the public have permitted a reasonably long and undisputed possession under colour of the patent, the Court has thought, upon the fact of that possession proved against the public, that there is less inconvenience in granting the injunction until the legal question can be tried, than in dissolving it at the hazard that the grant of the Crown may, in the result, prove to have been valid (7).

(1) *Caldwell v. Vanvlissengen*, 9 122; *Sargent v. Larned*, 2 Curt. 340; Hare, 424. *Clum v. Brewer*, 1b. 506; *Woodworth v. Stone*, 3 Story, 749 (Amr.).

(2) *Clerk v. Fergusson*, 1 Giff. 184.

(3) *Sargent v. Seagrave*, 2 Curt. 553 (Amr.).

(4) *Goodyear v. Day*, 2 Wall. Jun. 283. See *Washburne v. Gould*, 3 Story,

(5) *Thomas v. Weeks*, 2 Paine, 92 (Amr.).

(6) *Harmer v. Plane*, 14 Ves. 130.

(7) 1b.

3. In cases of patents the evidence required to prove that a patent has been pirated, must be determined by the nature of the subject-matter, and also by the opportunity possessed by the patentee, the person on whom is thrown, in the first place, the *onus probandi*. In ordinary cases of pirated patents in England, Courts of Equity have been in the habit, where there is a difficulty in obtaining proof, of granting a limited order of access and inspection of the machinery possessed, or the manufacture carried on, by the individual who is charged with the piracy. But where the opportunity of doing that is not enjoyed by the respondent, by reason of the locality of a foreign manufacture, and the opportunity of describing the actual process pursued abroad is possessed by the party charged with the piracy, and he can therefore rebut the *prima facie* evidence given by the patentee, he must do so, or assign a satisfactory reason for not having done so(1). The onus is on a patentee complaining of an infringement, to shew not merely that the thing made is his own patented article, but that it has been unlawfully sold, and he must be prepared to swear distinctly that it is not manufactured by him or his agent, and if the owner of a patent manufactures and sells the patented article in a foreign country as well as in England, the sale of the article in one country implies a license to sell and use it in the other, which can only be rebutted by such evidence as above mentioned, or an explicit agreement to the contrary (2).

4. If a case is brought to a hearing without a preliminary trial of the right at Law, the Court, if it is of an opinion that there is a sufficient case for protecting the plaintiff's right, subject to its establishment at Law, but not a case entitling the plaintiff to a perpetual injunction, without the establishment of the legal right, will, in its discretion, retain the bill, for instance, for a year, to give the patentee an opportunity of establishing his legal right (3). And although it is the ordinary rule of the Court not to grant a perpetual injunction to restrain the infringement of a patent, unless either the legal validity of the patent has been or is con-

(1) *Neilson v. Betts*, L. R. 5 H. L. 1, 239; 25 L. T. (N. S.) 188; 19 W. R. 11; 40 L. J. (Ch.) 317; 19 W. R. 1121. 369.

(2) *Betts v. Willmott*, L. R. 6 Ch. (3) *Ward v. Key*, 10 Jur. 792.

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clusively established, or the patent has been undisputed for many years, yet the circumstances of the case may be such as to induce the Court to depart from that rule (1). Long and exclusive enjoyment under letters patent entitle a party to an injunction until the legal right can be tried (2). The Court will, in such cases, grant an injunction in the first instance, without previously putting the party to establish his right at Law; but it is otherwise where the patent is recent (3). Though the Court will not generally, in doubtful cases, restrain the infringement of an asserted legal right until its validity has been established; yet it is otherwise where there has been long uninterrupted enjoyment under a patent, that being regarded as *primâ facie* evidence of title (4). But there must be no delay in filing the bill (5). And delay in filing a bill to restrain an infringement of a patent disentitles the plaintiff to an interlocutory injunction (6). If a Court of Common Law is equally divided upon the question of the validity of a patent, Equity will continue an interlocutory injunction to restrain its infringement, while another action is brought to obtain a decision as to its validity (7). The Court will grant an injunction before the hearing of the cause, in support of a patent right, where the patent is an old one, and there has been long and undisturbed enjoyment of it, or where its validity has been established elsewhere, and the Court sees no reason to doubt the propriety of the result, or where the conduct of the defendant has been such as to enable the Court to say, that as against the defendant himself, there is no reason to doubt the validity of the patent (8). The fact that an interdict has been granted against an infringer in Scotland is, as against him, sufficient *primâ facie* evidence of the validity of a patent for the United Kingdom, to warrant an interlocutory injunction (9). But the patentee, in order to entitle himself to an interim injunction on the ground of previous enjoyment, must shew that there has been an actual

(1) *Renard v. Levinstein*, 10 L. T. (N. S.) 94, 177; *Hills v. Evans*, 31 L. J. (Ch.) 457.

(2) *Curtis v. Cutts*, 8 L. J. (N. S.) (Ch.) 184; 3 Jur. 34.

(3) *Hill v. Thompson*, 3 Mer. 622.

(4) *Stevens v. King*, 2 Ph. 133.

(5) *Baxter v. Combe*, 1 Ir. Ch. Rep. 284.

(6) *Bovill v. Crate*, L. R. 1 Eq. 388.

(7) *Bolton v. Bull*, 3 Ves. 140.

(8) *Dudgeon v. Thomson*, 22 W. R. 464; 30 L. T. (N. S.) 244.

(9) *Ib.*

public user of his patent (1). Where there is a *prima facie* case of an infringement of a patent, the length of time the patent has been enjoyed by the patentee will influence the Court in granting an injunction against the parties who are alleged so to have infringed upon his rights (2). And even if there be great doubt as to the validity of a patent, yet a long undisturbed enjoyment—as for instance, for eight years—and the conduct of the defendant in not trying the question on a previous occasion when the plaintiff had raised it, will entitle the plaintiff to an injunction until the validity of the patent can be tried (3). If a patent has been in force a long period, for instance, twelve years, and has been the subject of four suits against different persons, all of which terminated favourably for the patentee, and in two of which verdicts were given in favour of the validity of the patent; the patentee will, in a fifth case, be entitled to an injunction pending the trial of the legal right, although a fresh fact may have been brought forward tending to impeach the novelty of the invention (4). As regards the infringement of a recent patent, it is not a matter of course to require the plaintiff to establish his right at Law, but the Court will have regard to the whole case made upon the pleadings and by the evidence (5). The fact that a patent is a recent one is no ground for refusing an injunction *ex parte* to restrain its infringement, but the party seeking such an injunction is bound to support his application by a clear and distinct statement upon affidavit, that he believes the patentee is the original inventor, and that the invention had not been practised at the time the patent was granted (6).

5. It is a principle of patent law that there must be the utmost good faith in the specification; that it must describe the invention in such a way, that a person of ordinary skill in the trade may be able to carry on the process (7). To be a good specification, it must be intelligible to an ordinary workman using that amount

(1) *Plympton v. Malcolmson*, L. R. 20 Eq. 37, 38; 44 L. J. (Ch.) 257; 23 W. R. 404.

(2) *Davenport v. Richard*, 3 L. T. (N. S.) 503.

(3) *Betts v. Menzies*, 3 Jur. (N. S.) 357; 10 H. L. C. 117; 9 Jur. (N. S.) 29.

(4) *Newall v. Wilson*, 2 De G. M. & G. 282.

(5) *Clark v. Fergusson*, 1 Giff. 184.

(6) *Gardner v. Broadbent*, 2 Jur. (N. S.) 1041.

(7) *Sturz v. De la Rue*, 5 Russ. 322; 7 L. J. (Ch.) 47.

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of skill and intelligence which is fairly to be expected from him (1). If a patentee has taken out a fresh patent for improvements on his original invention, it is sufficient if, reading his second specification with the first, an artizan would have no substantial difficulty in ascertaining what is claimed (2). Where a patented invention is partly original and partly communicated from a foreign country, it would appear that the part communicated from the foreign country should be defined in the patent, and in the specification, which should particularise what is new in the invention and what is old; and when this is not done, a Court of Equity, upon an interlocutory application, will refuse an injunction to restrain its alleged infringement. This rule will apply, not merely to this, but to other matters, when the letters patent and specification fail in explicitness; and the age or date of the patent is, under such circumstances, a material element in the consideration (3). Though it is part of the condition of a patent that the specification shall particularly describe and ascertain the invention, and, therefore, in a patent for an improved arrangement, or a new combination of machinery, the specification must describe the improvement and define the novelty otherwise and in a more specific form than by the general description of the entire machine; it must assign the *differentia* of the new combination, and if a specification is insufficient in this respect, the Court will dismiss a bill for an injunction (4). But it is clear that if the claim is for a combination of particular parts of a machine (and the claim of a new combination or arrangement of parts of a machine is the subject of a good patent), and for that only, the *differentia* is sufficiently assigned. If there is a patent for a combination, the combination itself is, *ex necessitate*, the novelty (5). But the specification of an invention which consists in the use of known materials in new proportions, is not necessarily bad for uncertainty, though the patentee does not limit himself to the proportions recommended; however, the evidence of persons acquainted with the usual modes of manufacture

(1) *Plimpton v. Malcolmson*, L. R. 3 Ch. D. 531.

(3) *Renard v. Levinstein*, 10 L. T. (N. S.) 177.

(2) *Parkes v. Stevens*, 38 L. J. (Ch.) 627; L. R. 8 Eq. 358; 17 W. R. 846.

(4) *Foxwell v. Bostock*, 4 De G. J. & S. 298; 12 W. R. 723.

(5) *Harrison v. The Amlerston Foundry Co.*, L. R. 1 App. Cas. 574, 578.

is necessary to determine whether the invention is stated with sufficient precision (1). A working caution, direction, or instruction, as to the mode of conducting a process previously known, although of the greatest possible value and utility, cannot be the subject of a patent, and the infringement of it will not be restrained (2). Patents are not *primâ facie* good, for the rule—(that is to say the general rule) (3)—is that where patents have been recently granted no injunction will issue until the right is established, but it may be different where a patent is of ten or a dozen years standing, therefore a defendant whose patent is not so old, will be restrained from issuing circulars which have the effect of intimidating the public, and thereby destroying the trade of another person in a similar article, the defendant must either establish his patent or cease to issue the circulars (4). If two parties are strangers to each other, not connected in business, one being a patentee, that party is not at liberty to go on threatening proceedings against the other party for infringing his patent, unless he follows up those threats by proceedings to establish its validity (5).

6. There is no doubt whatever that a man who acquires a license to use a patent cannot dispute its validity, as between himself and the patentee, during the currency of the license, just in the same way as a tenant is estopped from disputing the title of his landlord during the currency of his tenancy. But at the expiration of the license, he is as much at liberty to dispute it, as if he had never had a license at all, just as a landlord's title may be disputed by a tenant after the tenancy has expired (6).

7. A licensee is, during the continuance of the license, estopped from disputing the validity of the licensor's patent; and the only way in which the licensee can do so, is by putting an end to the agreement to take a license, and this he must do at his

(1) *Patent Typefoundry Co. v. Richard*, Joh. 381.

(2) *Patterson v. Gas Light and Coke Co.*, L. R. 2 Ch. D. 812, 835; 35 L. T. 11.

(3) *Clark v. Fergusson*, 1 Giff. 184; *Gardner v. Broudbent*, 2 Jur. (N. S.) 1041.

(4) *Rollins v. Hinks*, L. R. 13 Eq. 355, 361; 41 L. J. (Ch.) 358; 20 W. R. 287; 26 L. T. (N. S.) 56.

(5) *Axmann v. Lund*, L. R. 18 Eq. 330, 335; 43 L. J. (Ch.) 655; 22 W. R. 789; 31 L. T. (N. S.) 119.

(6) *Ib.* 337.

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peril (1). The fact of a patent having been found invalid at Law, upon proceedings between the patentee and third parties, is no answer to a suit, based upon the same patent, for an injunction and consequent relief against a licensee who has covenanted to pay royalties, and is selling the invention, contrary to his covenant, without payment of the royalties (2). A patentee who has granted a right or license to use his patent, cannot contravene that right, and will be restrained from doing any act in derogation of the grant to the licensee, for instance, from publishing circulars or advertisements calculated to lead persons to believe that the licensee was not authorized to make or sell the patented article (3). In order to effect an estoppel, arising upon a judgment at Law, for infringement of a patent, it is necessary that it should appear on the record that the question as to the validity of the patent was put in issue, and in any case, defendants in Equity, who were not made parties to the action at Law, cannot be estopped or prevented from setting up as a defence the invalidity of the patent (4).

8. Upon the invasion of a patent right, the party complaining has a right to the protection of an injunction, although the other party may promise to commit no further infringement (5). But a patentee cannot maintain a suit in Equity against a retail dealer who innocently sells articles which are an infringement of his patent, provided such retail dealer gives full information as to the persons from whom he obtained the articles complained of, and promises not to retail any more (6).

9. The right to a decree in Equity for an account of the profits made by the manufacture and use of articles, in the infringement of a patent, is incident to the right to an injunction to restrain future infringements, and where no case is made for the injunction,

(1) *Crossley v. Dixon*, 10 H. L. C. 293; 714; *vide Baird v. Neilson*, 8 Cl. & F. 9 Jur. (N. S.) 607; 32 L. J. (Ch.) 617; 726.

11 W. R. 716; 8 L. T. (N. S.) 260; (3) *Clark v. Adie*, 21 W. R. 456, et *vide Bowman v. Taylor*, 2 A. & E. 764.

278; *Baird v. Neilson*, 8 Cl. & F. 726; *Laues v. Purcer*, 6 E. & B. 930; (4) *Goucher v. Clayton*, 11 Jur. (N. S.) 107.

Hall v. Condor, 2 C. B. (N. S.) 22; (5) *Geary v. Norton*, 1 De G. & Noton v. Brooks, 7 H. & N. 499. Sm. 9.

(2) *Grocer and Baker Sewing Machine Co. v. Millard*, 8 Jur. (N. S.) (6) *Betts v. Wilmot*, 18 W. R. 946.

the account will not be decreed (1); and this rule in patent cases, that a Court of Equity cannot decree an account unless it can grant an injunction, applies, notwithstanding it may appear at the hearing that since an interim injunction was moved for, the defendant had sold articles which, had the facts and law been, on the application for the interim injunction, sufficiently ascertained, the Court would have restrained him from selling (2). A decree for an inquiry as to damages, and also an account of profits, is incorrect, as the two things are hardly reconcilable, for if you take an account of profits you condone the infringement, and the plaintiff must elect between the two, which he will adopt (3). A delay of nine years after the acts complained of have been done, will not be excused by the pendency of an action for damages for infringing a patent against other parties, though not decided in the plaintiff's favour until three years after the patent had expired; such a delay is fatal to the plaintiff's bill for an account and an injunction (4). Notwithstanding a cause comes to a hearing after the expiration of a patent, the Court can direct an account, but it must be in a case where there is no doubt as to its validity (5); for though before the hearing of a cause, the patent expire, yet if the infringement is proved, notwithstanding the rule—no injunction, no account—the jurisdiction of the Court relates back to the time of the filing of the bill, and the Court will award damages (6); and in directing an inquiry as to what damage the plaintiff has sustained, the inquiry will be in the form, “what damage the plaintiff has sustained,” and not “what damage, if any,” he has sustained, as it would be in the case of a trade mark; there is this difference between the case of a trade mark and that of a patent, that in the former case the article sold is open to the whole world to manufacture, and the only right the plaintiff seeks is that of being able to say, “Don't sell any goods

(1) *Smith v. London and South Western Railw. Co.*, 1 Kay, 408; 23 L. J. (Ch.) 562.

(2) *Price's Patent Candle Co. v. Banwen's Patent Candle Co.*, 4 K. & J. 727.

(3) *Neilson v. Betts*, L. R. 5 H. L. 1, 22; 40 L. J. (Ch.) 317; 19 W. R. 1121.

(4) *Smith v. London and South Western Railw. Co.*, 1 Kay, 408; 23 L. J. (Ch.) 562.

(5) *Fox v. Dellestable*, *Fox v. Jones*, 15 W. R. 194.

(6) *Davenport v. Rylands*, L. R. 1 Eq. 302; 35 L. J. (N. S.) 204; 14 W. R. 243.

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under my mark." He may find his customers fall off in consequence of the defendant's manufacture, but it does not necessarily follow that the plaintiff can claim damages for every article manufactured by the defendant, even though it be under that mark; on the other hand, every sale without license of a patented article must be a damage to the patentee; and the inquiry must extend to the sale by a defendant of any articles manufactured by him within six years before the filing of the bill, and up to the expiry of the patent (1). Courts of Equity will not entertain a patent suit where the bill is filed so shortly before the expiration of the patent, that it is impossible for the plaintiff to obtain any relief except damages, such a case being one in which, for all practical purposes, the patent has expired before the bill is filed, one in which it is impossible that the plaintiff can obtain any equitable relief whatever; where there cannot possibly be time to get an injunction, and the plaintiff can only obtain damages, which are properly sought by an action for damages (2). And if a patent has expired, and the infringement is innocent, accidental, and trivial, and not such as to have produced any substantial damage to the plaintiff, his bill for an injunction will be dismissed (3). Where bills in Equity to restrain the infringement of a patent have been filed against both the person who manufactures, and the person who uses the article, and issues of fact have been found for the plaintiff, it is the right of the plaintiff to have not only an account against the manufacturer, but also damages against the person using the article, wherever it may be found (4).

10. Where the issues directed to be tried in a suit to restrain an infringement of a patent, have all been found in favour of the patentee, the circumstance that appeals to the House of Lords have been lodged, will not be allowed to interfere with his right to an immediate decree and final order for an injunction (5).

(1) *Davenport v. Rylands*, L. R. 1 Eq. 302; 35 L. J. (Ch.) 204; 14 W. R. 243. *Penn v. Fernie*, L. R. 3 Eq. 308; 36 L. J. Ch.) 277.

(2) *Betts v. Gallais*, 18 W. R. 945.

(3) *Betts v. Willmott*, 18 W. R. 946.

(4) *Penn v. Bibby*, *Penn v. Jack*,

(5) *Penn v. Bibby*, L. R. 3 Eq. 308; 36 L. J. (Ch.) 277; *Ib.* and *Penn v. Jack* and *Penn v. Fernie*, 15 W. R. 192.

SECT. 2. *Copyright.*PART II.
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1. There is no remedy in Equity for a party who complains of a piracy of his work, unless he can make out that he is entitled to the equitable interposition of a Court of Equity; if he can, the right to an account will follow, that his remedy in Equity may be complete (1).

2. When a Court of Equity is satisfied that a piratical imitation has been made by a defendant, a plaintiff will not be put to the terms of trying his title at Law, although the defendant cannot take any steps to bring the fact to an issue before a jury (2). In cases of contested copyright, the Court is disposed rather to restrict than increase the number of cases in which it interferes by injunction before the establishment of the legal title; and it will give great weight to the consideration of the questions, which side is more likely to suffer by an erroneous or hasty judgment, and the prejudicial effect the injunction may have on the trial of the legal title (3).

3. If there be a doubt in a minor degree as to the fact of there being any copyright, the Court, although it will grant an injunction, will require the plaintiff to prove his alleged copyright (4); and the Court has jurisdiction to direct admissions in an action brought by the direction of the Court (5); or it will put the plaintiff upon an undertaking to try his right at Law, although it has granted an injunction restraining the alleged piracy (6). But if the question of the right to the copyright claimed is too doubtful, the Court will not interfere by injunction until that question has been decided (7).

4. If the owner of a copyright has, for some time previously to the application, acquiesced in different individuals transcribing portions of his work, the Court will not interpose in his favour by

(1) *Baily v. Taylor*, 1 Russ. & My. 209; 14 Jur. 1088; 20 L. J. (Ch.) 165; 73; Tam. 295.

(2) *Chappell v. Davidson*, 2 K. & J. 123.

(3) *M'Niell v. Williams*, 11 Jur. 344.

(4) *Dickens v. Lee*, 7 Jur. 183; *et vide Ollendorf v. Bluck*, 4 De G. & Sm.

(5) *Dickens v. Lee*, *supra*.

(6) *Sweet v. Cater*, 11 Sim. 572;

5 Jur. 68.

(7) *Chappell v. Purday*, 4 Y. & C.

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injunction against other parties who have subsequently transcribed portions from the same work, until the owner of the copyright has established his legal right (1). For if the conduct of a plaintiff has been such as, in the opinion of the Court, was calculated to induce the defendants to believe that the course taken by them would not be objected to by the plaintiff, the Court will refuse an injunction to restrain an alleged infringement of a copyright before a trial of the legal right (2). If the matter which is the subject of the alleged piracy forms but a very inconsiderable part of the plaintiff's work, and the work complained of has been published some years, the Court will not grant an injunction, but will leave the plaintiff to seek his legal remedy (3).

5. A Court of Equity will not make a decree for an injunction or an account of the profits of works of such a nature that the author could maintain no action at Law, but which the policy of the law will not permit him to consider his property; if no action at Law will lie, the Court ought not to give an account of the unhallowed profits of libellous publications (4).

6. When it can be traced that another work upon the same subject is not an original compilation, but a mere copy with colourable variations, the original will be protected by injunction, which, in a clear case of piracy, will be continued until the hearing, without a preliminary trial of the legal right (5). If the right to an injunction against the infringement of a copyright depends on the effect of an agreement, the Court will refuse an injunction until it is determined whether an action will lie on the agreement (6). But the Court will not send a case to Law which is not a proper one to be determined by a jury, as where the absurdity would arise of the necessity of a Judge to sit and hear two books read over, where one book is only a copy of the

(1) *Saunders v. Smith*, 3 My. & Cr. 711; *vide Platt v. Button*, 19 Ves. 447.

(2) *Saunders v. Smith*, 3 My. & Cr. 711; 7 L. J. (N. S.) (Ch.) 227; 2 Jur. 494, 536.

(3) *Baily v. Taylor*, 1 Russ. & My. 73; Taml. 295.

(4) *Walcot v. Walker*, 7 Ves. 1; *vide Lawrence v. Smith*, Jac. 471; *Murray v. Benbow*, 1b. 474, n.; *Southey v. Sherwood*, 2 Mer. 435.

(5) *Matthewson v. Stockdale*, 12 Ves. 270.

(6) *Walcot v. Walker*, 7 Ves. 1.

other (1). But where there is a fair doubt whether the law would give damages for the piracy of a work, a Court of Equity will not maintain an injunction granted *ex parte*, but will leave the plaintiff to establish his legal right before it interferes in his behalf (2). So if there be a doubt as to the right of the plaintiff to the copy-right (3).

7. But all these cases depend upon their own circumstances, and all the Court can do is to lay down the principles upon which it acts, in order that parties may know what measure of relief they have to expect in any particular case; and unless a case of this kind, depending upon a legal right, is very clear, it is the duty of the Court to take care that the right be ascertained before it exercises its jurisdiction by injunction; and the first question to be determined is as to the legal right; if the Court doubts about that, it may commit great injustice by interfering until that question has been decided; and it is much better, if the legal right is to be litigated, that the Court should abstain from expressing any opinion upon it in the meantime; but the greatest of all objections is, that the Court runs the risk of doing the greatest injustice, in case its opinion on the legal right turns out to be erroneous. If the plaintiff is right, the Court has some means, at least, of indemnifying him, by making the defendant keep an account; but if the defendant is right, and he is restrained, it is utterly impossible to give him compensation for the loss he would have sustained; and the effect of the order, in that event, would be to commit a great and irremediable injury; unless, therefore, the Court is quite clear as to what are the legal rights of the parties, it is much the safest course to abstain from exercising its jurisdiction till the legal right has been determined (4).

8. If it is impossible for the Court to obtain from a defendant any information as to the *quantum* of his piracy, but the Court is satisfied that in certain chapters of the defendant's work there

(1) *Gyles v. Wilcox*, 2 Atk. 143; L. J. (Ch.) 239; *vide Martin v. Anon.*, Loft. R. 775; *vide Jeffery v. Wright*, 6 Sim. 297.

Bowles, Dick. 429; *Carman v. Bowles*, (3) *Lowndes v. Duncombe*, 1 L. J. 2 Bro. C. C. 80; — *v. Leadbetter*, (Ch.) 51.

4 Ves. 681.

(4) *Spottiswoode v. Clarke*, 2 Ph.

(2) *Byron (Lord) v. Dugdale*, 1 154.; 1 Coop. C. C. 254.

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has been an improper use of the plaintiff's book ; it will restrain the publication of such chapters only, but not of the entire work, with a direction to the plaintiff to bring an action forthwith, and the defendant to keep an account in the meantime (1).

9. In a suit to restrain the piracy of a literary work, a plaintiff who, in opposition to the defendant's denial of his title, has obtained an injunction, is—in case by arrangement between the parties the title is not established at Law—entitled to an answer from the defendant for the purpose of having his title admitted, and also for the purpose of having an account from the defendant of the profits made by the sale of the spurious work (2). It is no defence to say that a pirated work is not offered for sale itself, but merely used to promote the sale of works mentioned in it (3).

10. There may be a fair use of other works of the same kind, but it is of vital importance that the new work shall have no mere copying, no merely colourable alterations, no blind repetition of errors (4). And it is of great importance, as evidence of *bona fides*, that the original manuscript should be produced (5). If it is seen that a defendant has exercised great pains and labour on his subject, for instance, a dictionary, he may copy a great deal from a plaintiff's work of the same kind, yet if the judge be convinced that the defendant has honestly exercised his mind upon his work, the Court will decide in his favour (6). So one person may originate a work in the same general form as that of another work of the same kind by another person, already published, provided he does so from his own resources, and makes the work he so originates, a work of his own by his own labour and industry bestowed upon it (7). And in determining whether an injunction should be ordered, the question, where the matter of the plaintiff's work is not original, is, how far an unfair or undue use has been made of the work (8). If, instead of searching into the common

(1) *Jarrold v. Houlston*, 3 K. & J. 708 ; 3 Jur. (N. S.) 1051.

(2) *Kelly v. Hooper*, 1 Y. & C. Ch. 197.

(3) *Hotten v. Arthur*, 1 H. & M. 603 ; 32 L. J. (Ch.) 771 ; *Butterworth v. Robinson*, 5 Ves. 709 ; *Bell v. Walker*, 1 Bro. C. C. 451.

(4) *Hotten v. Arthur*, *supra*.

(5) *Hotten v. Arthur*, *supra* ; *Spiers v. Brown*, 6 W. R. 352.

(6) *Hotten v. Arthur*, *Spiers v. Brown*, *supra*.

(7) *Jarrold v. Houston*, 3 K. & J. 708 ; 3 Jur. (N. S.) 1051.

(8) *Ib.*

sources and obtaining your subject from thence, you avail yourself of the labour of your predecessor, adopt (for instance, in a work consisting of questions and answers) his arrangement and questions, or adopt them with a colourable variation, it is an illegitimate use of another man's work; and falsely to deny that you have copied or taken any idea or language from any other work is a strong indication of *animus furandi* (1). Where two authors treat of the same subject, each being merely a compiler from various original works, it is a fair use of the work of one of them, if the other examine it for the purpose of seeing what works unprotected by copyright were referred to by that one, and the other or latter author may then himself refer to such unprotected works, and take from them whatever may be suggested by the book of the former author; and it is also a legitimate use of the work of the former one, if the latter, after having by his own labour brought his own work into shape, refer to the work of the former to supply omissions, but it is a piratical use of the work of the former, if the latter take the matter therein borrowed from authorities open to all the world, in order to save his labour and expense of consulting the original work (2).

11. A person may, by publishing a reprint of a work of which the copyright has expired, with notes and illustrations from other works, create a new copyright, which will be protected from piracy, and it is a piratical use of such copyright work to borrow therefrom any considerable number of the illustrations (3).

12. The question of the extent of appropriation which is necessary to establish an infringement of copyright is often one of extreme difficulty, but in cases of one description, namely, the publishing of plays dramatised from novels, the quality of the piracy is more important than the proportion which the borrowed passages may bear to the whole work; but, in such cases, it is enough if the defendant admits that one-fourth of the dramas is composed of matter taken from the novels (4). Though the matter pirated form an exceedingly small portion of a plaintiff's

(1) *Jarrold v. Houlston*, 3 K. & J. 708; 3 Jur. (N. S.) 1051.

(2) 1b.

(3) *Black v. Murray*, 9 Scotch Ses-

sion Cases, 3rd Series, 341.

(4) *Tinsley v. Lacy*, 1 H. & M. 747; 32 L. J. (Ch.) 535.

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work, yet where that matter bears a great proportion to the other matter in the defendant's work, the Court will restrain the sale of the work (1).

13. Where some only of the parts of a work alleged to be piratical, but forming a considerable portion of a publication, have been shewn to be pirated, and they are such as to justify the presumption that the general character of the work is piratical, the Court will restrain the publication of any copy of the work containing the pirated portions, without waiting till all the parts pirated can be ascertained (2).

14. Equity will restrain a colourable imitation of the title of a copyright work by an alteration thereof, such alteration is an infringement of the copyright in the title of the work (3).

15. The question of minuteness in value of the original matter extracted from a work for purposes of criticism, will have great weight with the Court in influencing its decision on an application for an injunction (4). And the Court is adverse to applications for injunctions to restrain the infringement of copyright, where it is difficult, if not impossible, to take an account of the loss complained of (5). So where the matter which is the subject of the alleged piracy forms but a very inconsiderable part of the plaintiff's work, and contains mere calculations, and the work complained of has been published some years, the Court will not grant an injunction, but leave the plaintiff to seek his legal remedy (6). It is not only the quantity but the quality of the matter extracted by a defendant from the work of which the plaintiff has the copyright, that is to be considered in an application to the Court for its interposition by injunction (7). And the question, whether one author has made a piratical use of another's work, does not necessarily depend upon the quantity of that work which he has quoted or introduced into his own book (8).

16. A fraudulent intention in infringing copyright is not ne-

(1) *Kelly v. Hooper*, 4 Jur. 2.

(2) *Lewis v. Fullarton*, 2 Beav. 6.

(3) *Mack v. Petter*, L. R. 14 Eq.
431; 41 L. J. (Ch.) 781; 20 W. R. 964.

(4) *Bell v. Whitehead*, 8 L. J.
(N. S.) (Ch.) 141; 3 Jur. 68.

(5) *Ib.*

(6) *Baily v. Taylor*, 1 Russ. & My.
73; Taml. 295.

(7) *Saunders v. Smith*, 3 My. & Cr.
711.

(8) *Bramwell v. Hulcomb*, 3 My. &
Cr. 737, 736.

cessary to entitle the proprietor of the copyright to relief, if his right of property has been invaded (1); nor will a full acknowledgment of the original, and the absence of any dishonest intent, excuse the appropriator where the effect of his appropriation is, of necessity, to injure and supersede the sale of the original work (2). And a rival publisher is not less liable to an injunction for piracy, because he makes inquiries on his own behalf to ascertain the correctness of what he copies (3).

17. If the Court is led to the conclusion that there has been piracy, it will not grudge any labour that may be requisite in order to ascertain how far an injunction should extend (4).

18. In a suit to restrain the piracy of a literary work, the plaintiff is entitled to a discovery, notwithstanding the defendant offers to submit to an injunction (5). A plaintiff has a right to a full and particular discovery as to the original sources from which a defendant alleges that he drew his work (6).

19. Delay in making the application will disentitle a plaintiff to an injunction to restrain the piracy of a publication. It is the duty of the Court in some circumstances—for instance, where the plaintiff has had a copy of the defendant's work a year before his bill was filed—to impute to the plaintiff such a knowledge of the contents of the defendant's work as made it his duty to apply for an injunction, if at all, at a much earlier period (7). Still, mere delay in taking proceedings in respect of a first edition of a work, where the piracy had not been discovered, will not amount to an acquiescence in the publication of a second edition of the work, so as to bring it within the 26th section of the Copyright Act (5 & 6 Vict. c. 45), prohibiting proceedings unless taken within twelve months from the publication of the work (8). The onus to shew laches is on a defendant (9).

(1) *Clement v. Maddick*, 1 Giff. 98; 5 Jur. (N. S.) 592.

(2) *Scott v. Stanford*, L. R. 3 Eq. 718.

(3) *Morris v. Ashbee*, 19 L. T. (N. S.) 550; L. R. 7 Eq. 34.

(4) *Jarrolld v. Houlston*, 3 K. & J. 708; 3 Jur. (N. S.) 1051.

(5) *Stevens v. Brett*, 10 L. T. (N. S.) 231.

(6) *Kelly v. Wyman*, 17 W. R. 399.

(7) *Lewis v. Chapman*, 3 Beav. 133.

(8) *Hogg v. Scott*, L. R. 18 Eq. 444; 22 W. R. 640; 43 L. J. (Ch.) 705; 31 L. T. (N. S.) 73, 163.

(9) *Chappell v. Davidson*, 2 K. & J. 123; *vide Buxton v. James*, 5 De G. & Sm. 80; 16 Jur. 15.

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20. The purchase of the copyright for a given period carries with it the right of printing and publishing, and the purchaser of the copyright for a given period is entitled to continue selling after the expiration of the period the stock printed by him under his purchase, and no injunction will be granted to restrain him from so doing (1). The Copyright Acts (8 Anne, c. 19, and 5 & 6 Vict. c. 45), are directed against unlawful printing, and when a party has acquired the right of lawfully printing a work, he is at liberty to sell, at any time, what he has so printed (2). Though a nice question might arise as to the number of copies of which an edition should consist (3).

21. The registered owner of a copyright in a work is, under the 23rd section of the 5 & 6 Vict. c. 45, entitled to have all the unsold copies of a piratical edition delivered up to him, for his own use, but to recover them he must proceed at Law. But as to the copies of such pirated edition which have been sold, he is not entitled in Equity to possess the gross produce of the sale thereof, but only to the net profits which the party may have made by the sale thereof (4). He has no right, in a Court of Equity, to an account of the gross proceeds (5).

22. The principles upon which a Court of Equity gives an account of the profits of an unlawful work in the case of piracy are these: it is true the Court does not by an account accurately measure the damage sustained by the proprietor of an expensive work, from the invasion of his copyright by the publication of a cheaper book; it is impossible to know how many copies of the dearer book are excluded from the sale by the interposition of the cheaper one; the Court, by the account, as the nearest approximation which it can make to justice, takes from the wrongdoer all the profits he has made by his piracy, and gives them to the party who has been wronged; in doing this the Court may often give the injured party more, in fact, than he is entitled to, for *non constat* that a single additional copy of the more expensive book would have been sold, if the injury by the sale of the cheaper book had not been committed; but a

(1) *Howitt v. Hall*, 10 W. R. 381.

(2) *Ib.*

(3) *Ib.*

(4) *Delf v. Delamotte*, 3 K. & J. 581; 3 Jur. (N. S.) 933.

(5) *Ib.*

Court of Equity, however, does not give anything beyond the account (1).

23. In estimating damages in cases of literary piracy, the defendant must account for every copy sold, as if it had been the plaintiff's, and pay the profit upon those copies to the plaintiff (2). If a plaintiff shew that his copyright has been infringed, the Court will grant an injunction without proof of actual damage (3).

24. Without determining the extent to which the owners of the copyright in a journal are justified in interfering with the editor in his editorial capacity, where the remuneration of the editor depends upon the success of the journal, the Court will not restrain the proprietors from altering articles proposed to be inserted by the editor, or inserting others contrary to his wish; it is the province of a jury to determine the amount of damage, if any, which the editor may have sustained by reason of the conduct of the proprietors (4). In case of a violation of the copyright of an author by inserting in a work portions of the author's copyright work, a Court of Equity will restrain the publication of such portions, without proof of damage (5). When the infringement complained of consists in copying a collection of facts which are easily obtained, the Court will not grant an interlocutory injunction, which would be useless, but will wait till the hearing, and then, if necessary, direct a reference as to damages (6).

25. The Court will restrain a party who has assigned his copyright in a publication and interest therein, for value, and has covenanted with the purchaser not to publish, either alone or in partnership with any other person, any publication of a similar nature, from violating his covenant (7); but the purchaser will be put upon terms to abide by any order the Court

(1) *Colburn v. Simms*, 2 Hare, 543; 12 L. J. (Ch.) 388; 7 Jur. 1104.

(2) *Pike v. Nicholas*, 38 L. J. (Ch.) 529; L. R. 5 Ch. 260, n.; 20 L. T. (N. S.) 906; 17 W. R. 842.

(3) *Smith v. Johnson*, 33 L. J. (Ch.) 137; 9 Jur. (N. S.) 1223.

(4) *Crookes v. Petter*, 6 Jur. (N. S.) 1131.

(5) *Campbell v. Scott*, 11 Sim. 31; 11 L. J. (N. S.) (Ch.) 166; 6 Jur. 186.

(6) *Cox v. Land and Water Journal Co.*, 18 W. R. 206; 21 L. T. (N. S.) 548.

(7) *Ingram v. Stiff*, 5 Jur. (N. S.) 947; 33 L. T. (N. S.) 195.

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may make as to damages, and to bring an action against the defendant (1).

26. If an author sells the copyright of a work published under his own name, and covenants with the purchaser not to publish any other work to prejudice its sale, another publisher who has notice of this covenant, will be restrained from publishing a work subsequently purchased by him from the same author, and published under his name, on the same subject, but under a different title, and though there be no piracy of the first work. And it would appear that if a covenantor and his partner were to publish a rival work on the same subject, the partner would be restrained as well as the covenantor (2).

27. But if a covenantor having entered into such a covenant with one person, were to sell the materials of a rival work to another person, who should conclude his agreement and pay his money without any notice of the covenant, it would appear that an injunction, on the ground of that covenant, could not be maintained against that other person (3).

28. A party violating the copyright of a publication cannot escape his liability to an injunction to restrain an infringement, by cautioning his shopmen to explain to purchasers that his publication is not the same as that of the party whose copyright he is infringing, because he cannot secure that the retail dealers purchasing from him will give the same information to their customers (4).

29. The copying into a newspaper whole articles taken from another periodical—as a monthly magazine—professedly for the purpose of reviewing, is an unlawful use for reviewing, and a Court of Equity will restrain the publication of the work containing those articles, notwithstanding an allegation that it is the custom of the trade (5).

30. A Court of Equity, where justice requires it, will grant an injunction to restrain a piracy on the application of a person

(1) *Ingram v. Stiff*, 5 Jur. (N. S.) 947; 33 L. T. (N. S.) 195.

(2) *Barfield v. Nicholson*, 2 S. & S. 1; 2 L. J. (Ch.) 90; S. C. *sub. nom.* *Barfield v. Kelly*, 4 Russ. 356.

(3) *Ib.*

(4) *Chappel v. Davidson*, 2 K. & J. 123.

(5) *Maxwell v. Somerton*, 22 W. R. 313; 30 L. T. (N. S.) 11.

having only an equitable title (1). And such a Court will disregard a permission from the author to infringe a copyright, given after he has parted with his equitable title for valuable consideration, and it has appeared upon the title-page of his work, that it was printed for the equitable assignee of the copyright (2). And the Court will interfere to protect copyright from piracy at the suit of a plaintiff who appears to have a good equitable title, even though it should not be quite clear that his legal title is complete (3). So it will protect a copyright which has been sold by the author, and afterwards assigned by writing to the plaintiff, although it may not appear whether the original assignment was in writing (4).

31. An injunction granted against a work which is published in successive numbers, on the ground of piracy in the published numbers, will not be modified so as to permit the publication of the future numbers, while the question of piracy as to the others remains undetermined (5).

32. Penalties and forfeitures must be waived by a party seeking relief in Equity in respect of a violation of his rights under the Copyright Acts (6).

SECT. 3. *Copyright in Designs.*

1. A Court of Equity will, in a case within the Copyright of Designs Acts, 5 & 6 Vict. c. 100, and the 6 & 7 Vict. c. 65, order the delivery up to the plaintiff, for the purpose of being destroyed, of the drawings and things used by a defendant in applying a plaintiff's design, and also the articles manufactured by the defendant to which the plaintiff's design has been applied; and it will grant an injunction restraining a defendant generally, who has manufactured with the plaintiff's pattern, although he does not intend

(1) *Chappell v. Purday*, 4 Y. & C. 485. and *Kyle v. Jeffreys*, 3 Macq. H. L. Cas. 611; *Jeffreys v. Boosey*, 4 H. L. C. 815).

(2) *Hodges v. Welsh*, 2 Ir. Eq. Rep. 266. (5) *Barfield v. Nicholson*, 2 S. & S. 1; 2 L. J. (Ch.) 90.

(3) *Mawman v. Tegg*, 2 Russ. 385.

(4) *Morris v. Kelly*, 1 Jac. & W. 481 (as to the assignment of a copyright, see 5 & 6 Vict. c. 45, ss. 13, 15, 40. (6) *Colburn v. Simons*, 2 Hare, 554; *Mason v. Murray*, cited 3 Bro. C. C. 40.

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to use the same for sale until after the expiration of the plaintiff's term of protection (1).

2. Though the difference between a registered design and a defendant's alteration be infinitesimal, the defendant shall not escape from what is right and just, and if the patterns designed are used exactly in the same manner and have the same or nearly the same effect, the Court will restrain the infringement of the copyright in the design (2). But when a sample of a pattern has been registered under 21 & 22 Vict. c. 70, s. 5, the design will not be infringed by an article produced upon the same principle, if different in style (3).

3. In a suit to restrain an alleged infringement of a copyright in a design registered under the 5 & 6 Vict. c. 100, the defendant does not lose his right to require the plaintiff to establish his legal title, although he delays doing so until the hearing of the cause, and has previously moved to dissolve upon a ground which cannot be maintained. But in such a case the bill will be retained and the injunction continued in the meantime, the plaintiff undertaking to establish his legal title (4).

SECT. 4. *Trade Marks.*

1. In granting injunctions to prevent the infringement of trade marks, a Court of Equity ordinarily (5) exercises its jurisdiction in aid of the legal right; *i.e.*, where an action could be maintained in a Court of Law; but it does not exercise an independent jurisdiction (6). Such a Court when it interferes in cases of trade marks, is exercising a jurisdiction over legal rights, and although sometimes, in a very strong case, it interferes in the first

(1) *McRae v. Holdsworth*, 2 De G. & Sm. 497; *McRae v. Holdsworth*, 12 Jur. 820.

(2) *McRae v. Holdsworth*, L. R. 6 Ch. 418; 19 W. R. 36; 23 L. T. (N. S.) 444.

(3) *Thom v. Syddal*, 26 L. T. (N. S.) 15.

(4) *Norton v. Nicholas*, 4 K. & J. 475.

(5) *Vide Singer Manufacturing Co. v. Wilson*, L. R. 2 Ch. D. 434, 454; *Colonial Life, &c., Co. v. Home and Colonial, &c., Co.*, 33 Beav. 548; *Millington v. Fox*, 3 My. & Cr. 338.

(6) *Foot v. Lea*, 13 Ir. Eq. Rep. 484; *Motley v. Downman*, 3 My. & Cr. 1.

instance by injunction, yet, in a general way, it puts the party upon asserting his right by trying it in an action at Law. If it does not do that, it permits the plaintiff, notwithstanding the suit in Equity, to bring an action; and in both cases the Court is only acting in aid of, and is only ancillary to, the legal right; and a case can hardly be conceived in which the Court would at once interfere by injunction, and prevent a defendant from disputing the plaintiff's legal title (1). And an injunction to restrain a defendant from using the particular style or title adopted by the plaintiff, will not be granted if the Court entertains the slightest doubt of the plaintiff's right to sustain his title at Law (2).

2. If a plaintiff coming for an injunction in the case of a trade mark, appears to have been guilty of misrepresentation to the public, a Court of Equity will not interfere in the first instance and give its assistance in aid of a legal right; and the case will be ordered to stand over, with liberty to bring an action (3). If there be a misrepresentation by a plaintiff as to an article being patent, which in fact is not so, that is so far fraudulent, that—coupled with a lapse of time without taking any steps—the Court will not interfere summarily by an injunction in the first instance to protect the plaintiff's alleged right to the exclusive use of a title or trade mark, but the Court will retain the bill for a certain period, with liberty to bring an action in the meantime (4). But a collateral misrepresentation that an article is protected by patent is no defence at Law, and the owner of the trade mark is, notwithstanding such a misrepresentation, entitled to the ancillary equitable remedy of an injunction to restrain the piracy (5). So if an alleged fraudulent imitation is not clearly made out, an injunction will only be continued on the terms of the plaintiff bringing an action, and being answerable in damages (6). If an answer, uncontradicted, allege facts which may affect the alleged legal right of the plaintiff to a trade mark, the Court will, at the

(1) *Motley v. Downman*, 3 My. & Cr. 1; *Foot v. Lea*, 13 Ir. Eq. Rep. 484.

(2) *Purcer v. Brain*, 17 L. J. (N. S.) Ch. 141.

(3) *Perry v. Trucfitt*, 6 Beav. 66; *Pidding v. How*, 8 Sim. 447.

(4) *Flavell v. Harrison*, 10 Hare, 467; 17 Jur. 368; 22 L. J. (Ch.) 886.

(5) *Ford v. Foster*, L. R. 7 Ch. 611, 626, 630; 48 L. J. (Ch.) 682; 27 L. T. (N. S.) 219; 20 W. R. 818.

(6) *Chappel v. Davidson*, 8 De G. M. & G. 1.

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hearing of the cause, only grant an injunction for a limited period, with liberty to the plaintiff to bring an action within a certain time, to try his right at Law (1).

3. If it does not appear that the assumption of a name somewhat similar to the plaintiff's name is likely to cause any injury to the plaintiff, the Court will not interfere, but will leave the plaintiff to bring his action at Law (2).

4. The Court will not grant an injunction unless it is satisfied that there will be deception, or that there is a probability or likelihood of deception, or that what the defendant does is calculated to deceive (3).

5. The right which a manufacturer has in his trade mark is the exclusive right to use it for the purpose of indicating where, by whom, or at what manufactory the article to which it is affixed was made (4). The principle in cases of trade marks is this: no man has a right to sell his own goods as the goods of another. The same principle may be expressed in a different form, namely, that no man has a right to dress himself in colours, or adopt and bear symbols to which he has no peculiar and exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose, either that he is that other person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own. It is perfectly manifest that to do these things is to commit a fraud, and a very gross fraud. The right which any person may have to the protection of the Court does not depend upon any exclusive right which he may be supposed to have to a particular name, or to a particular form of words; his right is to be protected against fraud, and fraud may be practised against him by means of a name, though the person practising it may have a perfect right to use that name, provided he does not accompany the use of it with such other circumstances as to effect a fraud upon others. It is perfectly manifest that two

(1) *Collins Co. v. Reeves*, 28 L. J. (Ch.) 56; 4 Jur. (N. S.) 865.

(2) *London and Provincial Law Assurance Society v. London and Provincial Joint Stock Life Insurance Co.*, 11 Jur. 938.

(3) *Cope v. Evans*, L. R. 18 Eq. 138, 151; 22 W. R. 453; 30 L. T. (N. S.) 292.

(4) *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. C. 523.

things are required for the accomplishment of a fraud of this character; first, there must be such a general resemblance of the forms, words, symbols, and accompaniments, as to mislead the public; secondly, a sufficiently distinctive individuality must be preserved, so as to procure for the person himself the benefit of that deception which the general resemblance was calculated to produce. To have a copy of the thing would not do; for, though it might mislead the public in one respect, it would lead them back to the place where they were to get the genuine article, an imitation of which was improperly sought to be sold. For the accomplishment of such a fraud it is necessary in the first instance to mislead the public, and in the next place, to secure a benefit to the party practising the deception by preserving his own individuality (1). The ground on which a Court of Equity protects trade marks is, that it will not permit a party to sell his own goods as the goods of another; and a party will not, therefore, be allowed to use names, marks, letters, or other *indicia* by which he may pass off his own goods to purchasers as the manufacture of another person (2).

6. Nothing can be better established than this, that a manufacturer is not entitled to sell his goods under the false representation that they are made by a rival manufacturer. The cases which come before the Courts may be conveniently divided into two classes; the first and more numerous class consists of cases where the goods manufactured are distinguished by some description or device in some way or other affixed to the article sold; or, where the goods are not capable of having anything put on the goods themselves, of a mark put on the vessel or covering containing or securing the goods. As to this, the first class, it is quite immaterial that the maker of the goods to which the trade mark is affixed did not know that it was a trade mark, and had not the slightest intention of defrauding anybody; he must not put as a mark on goods, even though he intends to establish it as his own trade mark, that which is the known trade mark of other people, and he would be restrained by injunction, though he thought that he himself had invented the trade mark, and *bonâ fide* intended it to designate goods of his own manufacture. The reason is obvious,

(1) *Croft v. Day*, 7 Beav. 84.

(2) *Perry v. Truefitt*, 6 Beav. 66.

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because the goods pass from hand to hand, and though he may act with the utmost *bona fides* yet the ultimate purchasers might believe that they were the real goods, that is to say that they were manufactured by the person entitled to the original trade mark. Therefore in that case, knowledge that he is doing anything wrong is immaterial even in the maker. Another element which is sometimes imported into these cases is, that if the maker knows that they are not the goods of the person entitled to use the trade mark and communicates that knowledge to the immediate purchaser, it makes no difference; and even if he does not know it and tells the immediate purchaser that the goods are of his own manufacture, it will still not save him from an injunction, because, although the immediate purchaser from him is aware that the goods in question are not manufactured by any other person than the vendor, yet, as he passes them on, the representation does not necessarily pass on with them, and therefore the next purchaser, or the following or some other purchaser, or the public at large, who are the ultimate purchasers, would be as much deceived as if no such communication had taken place. Consequently, whenever you get to a case of the first class, you have nothing more to do than to shew that the trade mark has been taken. The second class of cases are cases of a totally different character: they are always cases of fraud. They are cases where the defendant, without putting any trade mark at all on his goods, or putting a trade mark which is admittedly different in substance from the trade mark, if any, of the plaintiff on the goods, has represented the goods as being goods manufactured by the plaintiff. In this class of cases the defendant knows that the goods were manufactured by himself and not the plaintiff, and he knows that the representation he is using is to convey to the mind of the purchaser a contrary impression, and that is a distinct and direct fraud (1).

7. Though the evidence as to a plaintiff's right to a mark as a trade mark be very unsatisfactory, yet if the defendant has made so complete a copy of the plaintiff's mark that the difference is only nominal, he must be taken to have done so with an intent to gain an advantage to which he is not entitled (2).

(1) *Singer Manufacturing Co. v. (Ch.) 490; 24 W. R. 1023; 34 L. T. 858.*
Wilson, L. R. 2 Ch. D. 431, 440; 45 L. J. (2) *Hine v. Lart*, 10 Jur. 106.

8. Although at Law the single act of making use of the mark of another trader will not be sufficient to maintain an action, unless it be done with a fraudulent design, as to put off bad clothes, or to draw away customers (1); yet in Equity, the use of a trade mark, without any intention to defraud, where for a considerable time a trade has been carried on with the use of the mark as a distinctive one on goods, will be restrained (2).

9. If a trade mark contain an emblem with such a collocation of words as amounts to an advertisement of the character and quality of the goods, and contain statements which, though true as regards the original adopter of the trade mark, are calculated to deceive the public when used by his assignee; the assignee is not entitled to protection in the use of such trade mark (3). And where an advertisement or trade mark states that which is not true, it cannot be made the subject of protection by a Court of Equity (4). For when the owner of a trade mark applies for an injunction to restrain a defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not in his trade mark, or in the business connected with it, be himself guilty of any false or misleading representation; for if the plaintiff makes any material false statement in connection with the property he seeks to protect, he loses, and very justly, his right to claim the assistance of a Court of Equity (5). And it cannot be received as a rule, either of morality or Equity, that a plaintiff is not answerable for a falsehood because it may be so gross and palpable that no one is likely to be deceived by it (6).

10. The use of a trade mark by new partners or successors of original adopters is no fraud on the public, but only a statement that the goods are the goods of the firm whose trade mark they bear. If, however, the trade mark contain statements materially

(1) *Blanchard v. Hill*, 2 Atk. 484, 11 H. L. C. 523; 11 Jur. (N. S.) 513; 3rd Ed.; Poph. 144, 151. 35 L. J. (Ch.) 53; 33 L. J. (Ch.) 199;

(2) *Colonial Life Assurance Co. v. Home and Colonial Assurance Co.*, 33 1 H. & M. 271; 13 W. R. 873.

Beav. 548; *vide Millington v. Fox*, 3 (4) *Ib.*

My. & Cr. 338. (5) *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De G. J. & S. 137, 143.

(3) *Leather Cloth Co. (Limited) v. American Leather Cloth Co. (Limited)*, (6) *Ib.* 137, 148.

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affecting the value of the goods, such statements must be judged as if made in separate labels or advertisements, the test being, whether they are material misstatements and calculated to deceive the public (1).

11. If the goods of a trader derive their increased value from the personal skill or ability of the adopter of a trade mark upon those goods, he cannot give any other person the right to affix his name or mark upon their goods, for the effect thereof would be to give that person the right to practise a fraud upon the public (2).

12. A trade mark cannot exist in gross, and therefore a person who does not know the recipe for the original article cannot have the right to affix the trade mark of that article to a sham article for the purpose of imposing on the public (3).

13. Representations upon premises calculated to induce the public to believe that their owner is connected in business with a firm of established reputation, will be considered upon the same principles as govern rights in trade marks (4). And if a Court of Equity is of opinion that what such owner is doing is calculated to mislead the incautious, unwary, and heedless portion of the public, it will restrain such owner from continuing to use such representations in such a way as to mislead the public, even assuming there was no intention to do wrong (5). And an injunction will be granted to restrain the using of an inscription at business premises, if it amounts to a representation of a succession to the business of a late firm, when such is not the fact (6).

14. To entitle a trader to relief against an illegal use of his trade mark, it is not necessary that the imitation should be so close as to deceive persons seeing the two marks side by side; but the degree of resemblance must be such that ordinary purchasers, proceeding with ordinary caution, are likely to be misled (7). But if persons of ordinary intelligence are not likely to be misled by

(1) *Leather Cloth Co. v. American Leather Co.* 11 H. L. C. 523.

(2) *Ib.*

(3) *Cotton v. Gillard*, 44 L. J. (Ch.) 90.

(4) *Glenny v. Smith*, 2 Dr. & Sm. 476, 479, 480, 482.

(5) *Ib.*

(6) *Scott v. Scott*, 16 L. T. (N. S.) 143.

(7) *Seiro v. Provezende*, L. R. 1 Ch. 192; 12 Jur. (N. S.) 215.

the title of a publication, into purchasing a defendant's publication by mistake for the plaintiff's, the Court will not grant an injunction (1). The actual physical resemblance of two marks is not the sole question for the Court; for if the plaintiff's goods have, from his trade mark, become known in the market by a particular name, the adoption by a defendant of a mark or name which will cause his goods to bear the same name in the market, is as much a violation of the plaintiff's rights as the actual copy of his mark; and although a defendant may have some title to the use of a name or mark, he will not be justified in adopting it, if the probable effect of so doing is to lead the public to suppose that in purchasing his goods they are purchasing those of the plaintiff (2). The Court will not restrain the use of a label on the ground of its general resemblance to the trade mark of another manufacturer, if it is different in the points which a customer would look at, in order to see whose manufacture he was purchasing (3).

15. Whenever a name is established by any one as a trade mark, and its use has obtained, no other person can adopt the same name, because by doing so he might lead the public into believing they were dealing with one person when they were really dealing with another; in such cases a Court of Equity says, you shall not so deceive the public; the Court will restrain anything which might have the effect of so deceiving the public, and its doctrines are not restricted by any technical rules as to property (4). In cases of alleged colourable imitations of trade marks, a Court has not to consider whether manufacturers could distinguish between the articles, but whether the public would probably be deceived by the alleged spurious imitation (5). A party who has established a trade mark has a right to prevent anybody else from using it, so as to attract custom which would otherwise flow to himself; and a person who has been in the habit of using a particular mark may

(1) *Bradbury v. Becton*, 39 L. J. 242; 22 L. T. (N. S.) 251, 546; *vide* (Ch.) 57; 18 W. R. 33; 21 L. T. (N. S.) *Croft v. Day*, 7 Beav. 86; *Perry v. Trucfitt*, 6 Beav. 66; *Kelly v. Hutton*, L. R. 3 Ch. 708; 16 W. R. 1182;

(2) *Ib.*

(3) *Blackwell v. Crabb*, 36 L. J. *Bradbury v. Becton*, 18 W. R. 33

(Ch.) 504. (5) *Shrimpton v. Laight*, 18 Beav. 164.

(4) *Lee v. Haley*, 39 L. J. (Ch.) 284; L. R. 5 Ch. 155; 18 W. R. 181,

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prevent other persons from fraudulently taking advantage of the reputation which his goods have acquired, by using his mark in order to pass off their goods as his, to his injury (1).

16. It is not upon a *mala mens* towards a first purchaser, that Equity interferes to protect a manufacturer against the use, by another person, of the particular name of his manufactured article, but it is upon the ground that it is a necessary consequence of the first purchaser being furnished with goods with this name or label, that he is enabled to deceive others (2). Where the trade mark is not actually copied, fraud is a necessary element in the consideration of every question of piracy of trade marks—that is, the party accused of piracy must be proved to have done the act complained of, with the fraudulent design of passing off his own goods as those of the party entitled to the exclusive use of the trade mark (3).

17. Although when articles of a particular kind, of an original manufacturer or patentee, as the case may be, have become generally known in commerce, any person has a right, after the expiration of the patent, to manufacture such articles and sell them under that name; yet he may not, in inscribing the name as a proper name on his shop-front, or otherwise, lead the public to believe that he is selling as the agent for the original manufacturer (4). Slight differences, which would not be perceived without strict examination, will not protect an imitation from injunction (5). The use of a trade mark simulating another trade mark, calculated to mislead the public into a belief that it is the plaintiff's, will be restrained, although it bear the defendant's name, but in very small letters (6). The test for granting an injunction is a substantial similarity and an intent to continue the manufacture (7). In order to obtain an injunction: first an intention must be shewn to injure the originator, by disposing of the

(1) *Collins Co. v. Brown, Same v. Cohen*, 3 K. & J. 423; 3 Jur. (N. S.) 929.

(2) *Wotherspoon v. Currie*, L. R. 5 II. L. 508; 27 L. T. (N. S.) 393; 42 L. J. (Ch.) 130.

(3) *Ib.*

(4) *Wheeler and Wilson Manufac-*

turing Co. v. Shakespeare, 39 L. J. (Ch.) 36.

(5) *Williams v. Johnson*, 2 Bosw. 1 (Amr.).

(6) *Walton v. Crowley*, 3 Blatchf. C. C. 440 (Amr.).

(7) *Bradley v. Norton*, 33 Conn. 157 (Amr.).

defendant's wares as his; secondly, if consisting of words, they must indicate ownership and origin, not merely quality, kind, texture, composition, utility, intended use, or class of consumers. Names having a definite and established meaning, and not indicating ownership, origin, or something equivalent, cannot be exclusively appropriated (1). It is not necessary, in order to give a right to an injunction, that a specific trade mark should be infringed; it is sufficient that the Court should be satisfied that there was, on the whole, a fraudulent intention of palming off the defendant's goods as those of the plaintiff; but in such a case it is essential that the imitation should be necessarily calculated to deceive (2). It is not necessary that the whole of a trade mark should have been imitated (3). But if the use of a particular mark is likely to deceive, no evidence will be required of actual deception (4). But the use of a trade mark so as in fact to mislead the public, though unintentionally, will be restrained (5). At Law the proper remedy is by an action for deceit, and proof of fraud on the part of the defendant is of the essence of the action; but a Court of Equity will act on the principle of protecting property alone, and it is not therefore necessary for the injunction, to prove fraud (although it is necessary to entitle the plaintiff to an account of profits), or that the credit of the plaintiff was injured by the sale of an inferior article, and an injury by loss of custom is sufficient to support a title to relief (6). A plaintiff will not be disentitled to sue, by reason that he represents on his labels or trade mark the goods as patented, when in fact they are no longer protected by patent, nor although they may not be manufactured strictly according to the patent, nor exclusively or at all by the patentee. But a defendant is not precluded altogether from representing that his goods are manufactured according to a plaintiff's expired patent; but he must not do so in a manner liable to mislead (7). However, if a plaintiff systematically and knowingly has carried

(1) *Corwin v. Daly*, 7 Bosw. 222 1 De G. J. & S. 185; 9 Jur. (N. S.) 479; (Amr.). 11 W. R. 328.

(2) *Woollam v. Ratcliff*, 1 H. & M. 259. (5) *Welch v. Knott*, 4 K. & J. 747; 4 Jur. (N. S.) 330.

(3) *Braham v. Bustard*, 11 W. R. 1061. (6) *Edelsten v. Edelsten*, *supra*.

(7) *Edelsten v. Vick*, 11 Hare, 78; (4) *Ib. et v. Edelsten v. Edelsten*, 18 Jur. 7.

on a fraudulent trade, and delivered short weight, it is beyond all question that the Court of Equity will not interfere to protect him in carrying on such a trade (1).

18. Although there is no right of property in a person to the use of a particular name, to the extent of enabling him to prevent the assumption of his name by another, yet it is otherwise as to the exclusive use of the name in connection with a trade or business; this right is recognised, and it is a fraud on the part of any one to assume it, colourably or otherwise; or at least an invasion of another's right, and there is a remedy either at Law by an action, or in Equity to restrain the use of the name (2).

19. Although many manufacturers may subsequently to the invention and introduction of a manufactured article by a certain name—as for instance, “Reading Sauce,”—by unrestrained usage have acquired the right to call their articles by that name, yet the original inventor, and those claiming under him, have a right to restrain other parties from using such name with the addition of the words “the original,” without shewing that any purchaser was actually deceived (3).

20. Where a person is selling an article in his own name, fraud must be shewn, in order to constitute a case for restraining him from so doing, on the ground that the name is one in which another has long been selling a similar article (4). Where there is a strong resemblance in matter, colours, and arrangement, the Court will presume that it is not fortuitous, but that it was intentional, with a view to mislead purchasers (5). And in an alleged infringement of a right to trade marks, the Court must ascertain whether the resemblances and the differences are such as naturally arise from the necessity of the case; and whether, on the other hand, the differences are simply colourable, and the resemblances such as are obviously intended to deceive the pur-

(1) *Lee v. Haley*, 39 L. J. (Ch.) 284; L. R. 5 Ch. 155; 18 W. R. 181, 242; 22 L. T. (N. S.) 251, 546.

(2) *Du Boulay v. Du Boulay*, L. R. 2 P. C. 430; 17 W. R. 594; 38 L. J. (P. C.) 35; 6 Moo. P. C. C. (N. S.) 31; 22 L. T. (N. S.) 228; *vide* Hilliard, *hij.* p. 501, n., 2nd Ed.

(3) *Cocks v. Chandler*, 40 L. J. (Ch.) 575; L. R. 11 Eq. 446; 19 W. R. 593; 24 L. T. (N. S.) 379.

(4) *Burgess v. Burgess*, 3 De G. M. & G. 896; 17 Jur. 292; 22 L. J. (Ch.) 675.

(5) *Edelsten v. Vick*, 11 Hare, 78; 18 Jur. 7.

chaser (1). A party will not be allowed to use a plaintiff's name and certificates in favour of the plaintiff's goods in such a manner as *prima facie*, though not in fact, to appropriate and apply them to his own goods; and although there may be other differences in the mode of selling, the proceeding is wrongful, and will be restrained (2).

21. The number of years a defendant has used another's trade mark makes no difference as a matter of law, if it is proved that the words constituting the trade mark were originally used for the purpose of fraud; the lapse of time during which the trade mark has been so used will have no effect, except that the proof the Court would require, that such words were first used for the purpose of fraud, must be clearer than where the defendant has only recently adopted them. If he has recently adopted them, he may be called on for a plain and satisfactory explanation of his reasons for their adoption; and if that is not given, the Court will come to the conclusion that it was done fraudulently, even without precise evidence that any person has been actually deceived (3).

22. A person who has appropriated to himself a particular label, sign, or trade mark, indicating that a certain article is made or sold by him or by his authority, and with which label or trade mark the article is become identified, is entitled to the protection of a Court of Equity, which will enjoin any one who attempts to pirate upon the goodwill of his friends or customers by using such label, sign, or trade mark, without his authority; but there must be, between the genuine and fictitious marks, such general similarity or resemblance of form, colour, symbols, designs, and such identity of words and their arrangement, as to have a direct tendency of misleading buyers who exercise the usual amount of prudence and caution; and there must also be such a distinctive individuality in the mark employed by the counterfeiter as to procure to him the benefit of the deception resulting from the general resemblance between the genuine and counterfeit labels or trade marks (4).

(1) *Taylor v. Taylor*, 23 L. J. (Ch.) 225; *Holloway v. Holloway*, 13 Beav. 209. (3) *Rodgers v. Rodgers*, 22 W. R. 887, 888; 31 L. T. (N. S.) 285.

(2) *Franks v. Weaver*, 10 Beav. 297. (4) *Colladay v. Baird*, 7 Upp. Can. Law J. 132.

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23. An element of the right to property in a trade mark may be represented as being the fact of the article being in the market as a vendible article, with that stamp or trade mark, at the time when the defendant imitates it (1). Though there is no exclusive ownership of the symbols which constitute a trade mark, apart from the use or application of them, yet the exclusive right to use such mark in connection with a vendible commodity is rightly called property; and the jurisdiction of a Court of Equity to restrain the infringement of a trade mark is founded upon the invasion of such property, and not upon the fraud committed on the public; and also upon the fact that an injunction is the only mode by which the property can be protected (2). And the jurisdiction of the Court in the protection of trade marks resting upon property, fraud in the defendant is not necessary for the exercise of the jurisdiction (3). The essential ingredients for constituting the right to property in a trade mark, probably will be found to be no other than these: first, that the mark has been applied by the plaintiff properly—that is to say, that he has not copied any other person's mark, and that the mark does not involve any false representation; secondly, that the article so marked is actually a vendible article in the market; and, thirdly, that the defendant has imitated the mark for the purpose of passing in the market other articles of a similar description (4). But it is settled that knowledge by a party imitating a trade mark, that another party has acquired property in the trade mark, is not necessary to entitle a plaintiff to an injunction; for the Court will restrain the use by one tradesman of the trade marks of another, although such marks have been used in ignorance of their being any person's property, and under the belief that they were merely technical terms (5). But

(1) *McAndrew v. Bassett*, 4 De G. J. & S. 380, 384; 33 L. J. (Ch.) 561, 567; 10 Jur. (N. S.) 492, 550; 33 L. J. (Ch.) 561.

(2) *Leather Cloth Co. v. American Leather Cloth Co.*, 33 L. J. (Ch.) 199; 10 Jur. (N. S.) 81; 9 L. T. (N. S.) 558.

(3) *Hall v. Barrows*, 4 De G. J. & S. 150, 156; 33 L. J. (Ch.) 204; 10 Jur. (N. S.) 55; 9 L. T. (N. S.) 561.

(4) *McAndrew v. Bassett*, 4 De G. J. & S. 380, 384; 10 Jur. (N. S.) 492, 550; 33 L. J. (Ch.) 561.

(5) *Edelsten v. Edelsten*, 1 De G. J. & S. 185, 199; 9 Jur. (N. S.) 479; 11 W. R. 328; *et vide* *Moet v. Couston*, 33 Beav. 578; 10 Jur. (N. S.) 1012; 10 L. T. (N. S.) 395; *Harrison v. Taylor*, 11 Jur. (N. S.) 408; *Cartier v. Carlisle*, 31 Beav. 292; 8 Jur. (N. S.) 183.

the plaintiff in such a case is not entitled to an account, nor to compensation, except in respect of any user by the defendant after he became aware of the prior ownership (1). An owner of a trade mark will not be deprived of remedy in Equity, even if it is shewn that all who bought goods bearing the mark from the defendant, were well aware that the goods were not of the plaintiff's manufacture. It is enough if the goods were supplied by the defendant for the purpose of being sold again in the market; nor is it necessary to shew that any person was deceived, if the resemblance of the articles is such as would be likely to cause one mark to be mistaken for the other (2).

24. The Court will not interfere for the protection of a trade mark, unless the mark used by the defendant is applied by him to the same kind of goods as the goods of the plaintiff, and is such that it may be, and is, mistaken in the market for the trade mark of the plaintiff; and the plaintiff must prove that the defendant has used the mark so as to prejudice him in his business (3).

25. A manufacturer who has adopted a trade mark to designate some particular article as made by him, has a right to the assistance of a Court of Equity to prevent any one from so using the same, or any similar mark, as to induce purchasers to believe, contrary to the fact, that they are buying that particular article to which the mark was originally applied (4). It would seem to be a ground of Equity that a party, by knowingly printing labels in imitation of a plaintiff's trade mark, and selling them to any one who asks for them, is supplying the means of committing, and is thus a party to, frauds with which Courts of Equity will interfere to stop at their source (5).

26. If a trade mark contains a material misrepresentation as to the character of the goods to which it is applied, the Court will not interfere to protect the use of it, even though the misrepresentation should be so obvious that no purchaser would be deceived (6).

(1) *Edelsten v. Edelsten*, 1 De G. J. & S. 185, 199; 9 Jur. (N.S.) 479; 11 W. R. 328.

(2) *Ib.*

(3) *Leather Cloth Co. v. American Leather Cloth Co.*, 33 L. J. (Ch.) 199; 10 Jur. (N.S.) 81; 9 L. T. (N.S.) 558.

(4) *Farina v. Silverlock*, 1 K. & J. 509; 4 K. & J. 650.

(5) *Ib.*

(6) *Leather Cloth Co. v. American Leather Cloth Co.*, 33 L. J. (Ch.) 199; 10 Jur. (N. S.) 81; 9 L. T. (N. S.) 558; 4 De G. J. & S. 137, 142.

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27. If a name impressed upon a vendible commodity pass^{es} current in the market as a representation that the commodity has been manufactured by a particular person, the Court would not transfer to another person the right to use the name simply and without addition; but if it sold the business carried on by the owner of the name, it might give to the purchaser the right to represent himself as the successor in business of the first maker, and in that manner to use the same name. But where a name once affixed to a manufactured article continues to be used after the death of the manufacturer, the name in time becomes a mere trade mark, or sign of quality, and ceases to denote, or to be current as indicating, that any particular person is the maker, and would therefore be protected (1). And a trade mark consisting of the initials of the first manufacturers of the goods may, in the course of time, become a mere mark of quality, without implying a guarantie that the goods are still manufactured by the same traders; and such a mark will be protected by the Court on the ground of property (which is the true ground of the jurisdiction of the Court in the protection of trade marks), even in the absence of fraud (2). There is no exclusive ownership of the symbols which constitute a trade mark, apart from the use or application of them; but the word "trade-mark" is the designation of these marks or symbols, as and when applied to a vendible commodity, and the exclusive right to make such user or application is rightly called property. The true principle, therefore, would seem to be that the jurisdiction of the Court, in the protection given to trade marks, rests upon property, and that the Court interferes by injunction, because that is the only mode by which property of this description can be effectually protected (3).

28. Where any person introduces into the market an article which, though previously known to exist, is new as an article of commerce, and has acquired a reputation therefrom in the market by a name not merely descriptive of the article, a Court of Equity will protect the use of that name, and no other person will be

(1) *Leather Cloth Co. v. American Leather Cloth Co.*, 33 L. J. (Ch.) 199; 10 Jur. (N. S.) 81; 9 L. T. (N. S.) 558; 4 De G. J. & S. 137, 142.

(2) *Ib.*

(3) *The Leather Cloth Co., Limited, v. American Leather Cloth Co., Limited*, 4 De G. J. & S. 137, 142.

permitted to sell a similar article under the same name; and this, although the peculiarity of the name has long been in common use as applied to goods of a different kind. And it will make no difference that the plaintiff has also a trade mark which has not been taken by the defendant (1). The Court will restrain the use by a third party, of an arbitrary name which a plaintiff has invented and applied to a particular class of goods as sold by him, and which has thus become identified with the plaintiff's goods, where the sale of that class of goods is open to all the world (2). But where the class of goods is a patented article, no such protection will be afforded, for the name becomes identified with the goods, not because they are the plaintiff's, but because he alone, as patentee, can make and sell them; and if the goods are the same, but made or manufactured in a totally different way and from a totally different natural source, so that there is no infringement of the patent, a third party may use the name fixed upon by the patentee (3).

29. Although a party, by dismissing a former bill, has abandoned all right to the exclusive use of a term, he is entitled to restrain any person from selling a similar article as the "original" one, if he can shew that any one has been misled by that title into buying the defendant's goods instead of those of the plaintiff (4).

30. A man who innocently uses a trade mark, will be restrained from the further use thereof (5). And so if a person innocently sell goods bearing a spurious trade mark, he will be restrained from so doing (6), but he is not, in Equity, liable to account for the profits made thereby during the time that he was ignorant of the prior ownership (7).

31. If the owners of a trade mark do not know who are the invaders of their trade mark, they are entitled to a discovery from a shipper of the names of the consignors of goods bearing

(1) *Braham v. Bustard*, 1 H. & M. 447; 11 W. R. 1061.

(2) *Young v. Macrae*, 9 Jur. (N. S.) 322; *Edelsten v. Edelsten*, 1 De G. J. & S. 185; 9 Jur. (N. S.) 479; 11 W. R. 328; *McAndrew v. Bassett*, 10 Jur. (N. S.) 492, 550; 33 L. J. (Ch.) 561.

(3) *Ib.*

(4) *Browne v. Freeman*, 12 W. R. 305.

(5) *Burgess v. Hill*, 26 Beav. 244; *Harrison v. Tylor*, 11 Jur. (N. S.) 408.

(6) *Moet v. Couston*, 33 Beav. 578; 10 Jur. (N. S.) 1012.

(7) *Moet v. Couston*, *supra*; *Edelsten v. Edelsten*, 1 De G. J. & S. 185.

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marks which are counterfeits of the owner's trade mark; the position of an actual shipper, in such a case, is different from that of a mere witness, and he can be made a defendant in a bill for such discovery (1). And a manufacturer of an article stamping the same with a trade mark at the order of another person, not the owner of the mark, will be restrained from manufacturing the article with that mark (2).

32. There is no doubt that a word which was originally a trade mark, to the exclusive use of which a particular trader may have been entitled, may subsequently become *publici juris*; but a trade mark may become *publici juris* as between the wholesale dealer and the retail dealer, while, at the same time, it may not be so, as between the retail dealer and the public, his purchasers (3).

33. The Court will not restrain the use of an English adjective merely descriptive of quality, though a foreign word may, however, be used as a trade mark (4).

34. In the sale of a business, a trade mark passes, whether specially mentioned or not, and the Court will restrain the use of the trade mark by the vendor (5).

35. If a plaintiff, upon obtaining a decree restraining the use of a trade mark, also obtain a direction for an inquiry whether he has sustained any and what damage, and he does not prove any direct damage; he cannot, in the absence of evidence to what extent the defendant had used the trade mark, claim damages equal to the profits made by the defendant on his sales of the article upon which the trade mark was used; such a claim would be asking the Court to assume that the plaintiff would have sold all the articles which the defendant had sold marked with the trade mark; and this assumption the Court cannot make (6).

36. Delay in filing a bill to restrain the infringement of a trade

(1) *Orr v. Diaper*, L. R. 4 Ch. D. 53, 54; 29 L. T. (N. S.) 448; L. R. 92. 17 Eq. 29; 43 L. J. (Ch.) 64.

(2) *Collins Co. v. Walker*, 7 W. R. 222. (5) *Shipwright v. Clements*, 19 W. R. 599.

(3) *Ford v. Foster*, L. R. 7 Ch. 611; 41 L. J. (Ch.) 682; 27 L. T. (N. S.) 219; 20 W. R. 818. (6) *Leather Cloth Co. v. Hirschfeld*, 14 W. R. 78; 13 L. T. (N. S.) 427.

(4) *Ruggett v. Findlater*, 22 W. R.

mark will disentitle the plaintiff to an interlocutory injunction (1). And where the delay is great, the laches will disentitle him to any relief (2). But if the plaintiff is obliged to wait until sufficient proof of the injury he has received is collected, the Court will not impute laches to him (3). Delay—for instance, five months delay—is fatal to an appeal from an interlocutory order refusing an injunction (4).

SECT. 5. *Letters.*

1. The author of any letter or letters, or his personal representative, whether literary compositions, or familiar letters, or letters of business, possesses the exclusive right of publishing them; and the receiver, or his personal representative, can only justify their publication without the consent of the writer, when it is necessary to do so, in order to vindicate the character of the receiver from false imputations cast upon him by the writer, or in order to vindicate the rights of the receiver (5). The sending of a letter bearing the character of a literary composition, does not give the person to whom it is transmitted, the right to publish it for his own benefit (6).

2. The receiver of a letter is the owner of it (7); and there is no joint property in a letter, between the receiver and the writer; but possession by the receiver does not give him license to publish it (8). The receiver of a letter may use it for all lawful purposes, and the only right which the writer of it has, in reference to it, is to restrain publication (9). The writer of a letter trusts the receiver with the letter; if the sender of a letter wishes to restrain the

(1) *Flavell v. Harrison*, 10 Hare, 467; 17 Jur. (N. S.) 368; 22 L. J. (Ch.) 866. V. & B. 19; *Woolsey v. Judd*, 4 Duer. 379 (Amr.); *Thompson v. Stanhope*, Amb. 737; *Cudell v. Stewart*, 1 Bell, Com. 116, n.

(2) *Beard v. Turner*, 13 L. J. (N. S.) 746.

(3) *Lee v. Haley*, 39 L. J. (Ch.) 284; L. R. 5 Ch. 155; 18 W. R. 181, 242; 22 L. J. (N. S.) 251, 546.

(4) *Burgess v. Burgess*, 3 De G. M. & G. 896; 17 Jur. 292; 22 L. J. (Ch.) 675.

(5) *Perceval (Lord) v. Phipps*, 2

(6) *Perceval v. Phipps*, *supra*.

(7) *Hopkinson v. Burghley (Lord)*, L. R. 2 Ch. 447; 36 L. J. (Ch.) 504.

(8) *Ib.*; (*Pope v. Curll*, 2 Atk. 342, speaks of a "joint property" between the receiver and writer).

(9) *Hopkinson v. Burghley*, *supra*.

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receiver from shewing it to any other person, he must file a bill for that purpose, and unless that is done, the property is in the receiver. The question in all these cases is, what was the purpose or object in the mind of the person sending the letter? and the writer is supposed to intend that the receiver may use it for any lawful purpose; but publication is not such a lawful purpose (1).

SECT. 6. *Chattels, Specific Chattels, Fixtures, Pictures, Paintings, Game.*

1. Where a chattel, from being used in business or otherwise, has a peculiar value, a Court of Equity will entertain a bill for an injunction to restrain its sale or detention (2); and where specific things necessary for conducting a particular business, are in the possession of persons who claim a lien upon them and threaten an immediate sale, the Court has undoubted jurisdiction to interfere by injunction, and prevent irreparable injury to the debtor, by giving him an opportunity of redeeming (3). So the Court has jurisdiction to order the delivery up to an artist, of a picture painted by himself, as having a special value, or as being a specific chattel of a peculiarly valuable kind, the legal remedy being inadequate (4). But if, by putting a fixed price upon an article, damages are an adequate remedy, that circumstance will raise an insuperable difficulty to the exercise of the jurisdiction of a Court of Equity in such cases (5). But the jurisdiction of the Court by injunction to protect the possession, and to decree the delivery up of specific chattels, is not merely, as to such, the loss or injury to which, would not be adequately compensated by damages, it extends to all cases where the possession has been acquired through an alleged abuse of a party standing in a fiduciary relation to the plaintiff (6). A Court of Equity has jurisdiction for the delivery

(1) *Hopkinson v. Burghley (Lord)*, H. 544; *et vide Fells v. Read*, 3 Ves. L. R. 2 Ch. 447; 36 L. J. (Ch.) 504. 70; *The Pusey Horn Case*, 1 Vern. 273.

(2) *North v. Great Northern Railw. Co.*, 2 Giff. 64. (5) *Dowling v. Betjemann*, 2 J. & H. 544, 553.

(3) *Ib.*

(6) *Wood v. Rowcliffe*, 2 Ph. 382; (4) *Dowling v. Betjemann*, 2 J. & 3 Hare, 304; 6 Hare, 187.

up of chattels, and where there is a joint interest, permits some to sue as individuals representing the rest, in other instances than those of creditors and legatees (1). The right to be protected by injunction in the use or beneficial enjoyment of property *in specie*, is not confined to articles possessing any peculiar or intrinsic value (2). And goods, such as pictures, furniture and other articles in trust for a married woman, will be protected by an injunction from being disposed of (3). And upon the same principles of fiduciary relationship, express or implied, or irreparable injury, or the protection of the legal or equitable right, a Court of Equity will restrain the sale or removal of fixtures upon premises, whether they belong to the landlord, by the rules of the Common Law (4), or have by contract been rendered irremovable (5).

2. A tenant, with an exclusive right of sporting and killing game, will be protected by an injunction from the interference of his landlord, by disturbing, driving away, or destroying game, in the exercise of that right according to the terms of an agreement not under seal, until a lease can be executed under seal, according to the agreement (6). In order to acquire such a right an instrument under seal is necessary, as at Law an instrument purporting to grant such a right, though given for a valuable consideration, is revocable at any time (7). Therefore a plaintiff in such a case has no remedy at Law until a deed has been executed by the landlord containing a proper and legal grant of such exclusive right of sporting (8). But a landowner who has agreed to demise land for a term of years with the exclusive right of shooting, or who has granted such a lease, will not be prevented by a Court of Equity from cutting trees upon the estate in the course

(1) *Lloyd v. Loaring*, 6 Ves. 773.

(2) *Wood v. Rowcliffe*, 2 Ph. 382;
3 Hare, 304; 6 Hare, 187.

(3) *Arundell (Lady) v. Phipps*,
Arundell (Lady) v. Twunton, 10 Ves.
139.

(4) *Richardson v. Ardley*, 38 L. J.
(Ch.) 508; *Pugh v. Arton*, L. R. 8 Eq.
626; 17 W. R. 984; 38 L. J. (Ch.)
619; 20 L. T. (N. S.) 865; *Jenkins v.*

Gething, 2 J. & H. 520.

(5) *Bidder v. Trinidad Petroleum*
Co., 17 W. R. 153.

(6) *Frogley v. Earl Loveluce*, Joh.
333.

(7) *Wood v. Leadbitter*, 13 M. & W.
838.

(8) *Frogley v. Earl Lovelace*, *supra*;
vide Birkbeck v. Paget, 31 Beav. 403.

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of his management of his estate in the way he thinks best, the landlord, of course, not doing anything for the express purpose of injuring the right of shooting (1).

SECT. 7. *Stocks, Consols—Policies—Deeds, Instruments—Bills of Exchange, I. O. U.'s, Promissory Notes—Bonds.*

Stocks, Con-
sols.

1. If the circumstances of a case are fraught with suspicion that a transfer of stock has been obtained by inequitable means, a Court of Equity will restrain the transferee from making a transfer, or receiving the dividends until the hearing of the cause (2). So the transfer of stock which is suspected to have been produced from the moneys of a principal, or from the mixture of his moneys and those of an agent—for instance, a steward—will be restrained by an interlocutory injunction, less mischief being done by fixing the injunction upon the whole, till it can be ascertained what is the principal's, than by not fixing the injunction upon any part, thus giving the agent an opportunity of doing enormous injustice (3). If a transfer is about to be made of stock to wrong persons through mistake, the Court will grant an injunction to restrain the transfer where there are grounds for believing that the defendant will avail himself of the error, and will refuse to make a re-transfer (4). And the Court will restrain the transfer of stock or dividends standing in the name of a testator, or in a defendant's own name, belonging to the testator *pendente lite* in a Court for the proof of wills, upon the will of a testator (5).

Policies.

2. A Court of Equity will restrain a company from transferring its business and assets to another company contrary to the provisions of its deed of settlement, and without making provision out of its assets for the payment of a policy for which its funds are liable (6). If, upon an insurance, there be concealment of a

(1) *Gearns v. Baker*, L. R. 10 Ch. 46, 50.

355; 44 L. J. (Ch.) 334; 23 W. R. 543;

33 L. T. (N.S.) 86; 44 L. J. (Ch.) 334.

(2) *Custance v. Cunningham*, 13 Beav. 363.

(3) *Chedworth v. Edwards*, 8 Ves.

(4) *Arkwright v. Gryles*, 13 L. J. (N. S.) Ch. 303.

(5) *King v. King*, 6 Ves. 172.

(6) *Kearns v. Leaf*, *Aldebert v. Kearns*, 1 H. & M. 681.

ship's danger, a Court of Equity will grant an injunction and relieve the insurers against the insurance as fraudulent, and will decree the policy to be delivered up, but direct the premium to be paid back. The insured must deal fairly with the insurers, and must disclose to them what intelligence he has of the ship being in danger, which might induce him at least to fear that it is lost, though he has no certain account of it; the concealing of such intelligence is a fraud (1).

3. Where deeds are executed by both parties with a fraudulent intent, it would seem that no relief will be given to either, in such cases neither party has a right to apply to a Court of Equity (2).

4. If there is any doubt of the possible effect of a lost instrument—for instance, an agreement—the trial of an issue will be directed; but the Court will not restrain a party claiming against that instrument, from proceeding at Law until the production of the instrument, which may never be capable of being produced, on the ground that the instrument or contract might amount to the total relinquishment of the right the party is insisting upon at Law; but it is otherwise where, though there is not any suspicion of unrighteous spoliation, there has been negligence; in that case all the inconvenience must rest upon the negligent party (3).

5. The result of an examination of the authorities, with reference to the right to have a bill of exchange delivered up to be cancelled, seems to be, that if a party has wrongfully obtained possession of a bill of exchange, although under circumstances which would give a complete defence at Law, Equity will nevertheless interfere, if from lapse of time or death of witnesses such defence is likely to fail; but that if the objection, being apparent on the face of the instrument, must always be open to the defendant whenever such action be brought against him, he is not entitled to apply to a Court of Equity for relief (4). And the cases of fraud where a bill has been ordered to be given up are confined to those where the possession, but for the fraud, would be that of the plaintiff in Equity (5). But after an action has been

Deeds, Instruments.

Bills of exchange,
I. O. U's,
Promissory notes.

(1) *De Costa v. Scandret*, 2 P. Wms. 170.

(2) *Brackenbury v. Brackenbury*, 1 J. & W. 391.

(3) *Power v. Sheil*, 1 Moll. 296, 312, e.

(4) *Jones v. Lane*, 3 Y. & Coll. 281.

(5) *Ib.*

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brought on a bill of exchange, or a bond, and the amount has been recovered at Law and received by the plaintiff in the suit in Equity, there appears to be no instance of a bill being filed to have such instruments delivered up (1).

6. A Court of Equity will grant relief against a bill of exchange said to be for value received, but gained by fraud and for a fictitious consideration (2), and a note given *ex turpi causâ* will be set aside (3). The purchase of a share in mines which prove to be a bubble, or money paid for effecting illegal assurances, are not such considerations as will support a bill of exchange in Equity (4). And a promissory note, if suspicious in itself under the circumstances, and the admitted object of it is an improper one, even if the note be actually genuine, will be decreed, at the instance of the person alleged to have given it, to be deposited in Court in the first instance, with a declaration that the plaintiff is entitled to be relieved against it, without preventing the defendant from bringing an action on it within a reasonable time, and if there be delay in doing so, then he is entitled to have the bill delivered up (5). So the Court will relieve against bills of exchange given without consideration indorsed to a holder as a mere trustee (6). Bills of exchange made in a foreign country, on foreign stamps, and substituted in that foreign country for English, which were originally given for a gambling debt, will be ordered to be given up (7). The Court will restrain the negotiation of or parting with bills or notes obtained upon an illegal transaction, as at play, or fraudulently (8). And if the right is clear, the Court will refuse an opportunity of trying it at Law, and decree an immediate delivery of such bills (9). An indorsee of a note impeached on the ground of fraud, with notice that such note was not to be negotiated, but to be an item in further settling accounts between the

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| (1) <i>Threlfull v. Lunt</i> , 7 Sim. 627. | (6) <i>Knill v. Chadwick</i> , 16 L. J. (N. S.) Ch. 410. |
| (2) <i>Dyer v. Tymewell</i> , 2 Vern. 122; 2 Freem. 112. | (7) <i>Wynne v. Callander</i> , 1 Russ. 293. |
| (3) <i>Robinson v. Cox</i> , 9 Mod. 263. | (8) — <i>v. Blackwood</i> , Anstr. 351; 3 Bouv. Inst. 128 (Amr.) |
| (4) <i>Browne v. Marsh</i> , Gilb. Eq. Rep. 154; <i>Ex parte Mather</i> , 3 Ves. 373. | (9) <i>Newman v. Milner</i> , 2 Ves. J. 483. |
| (5) <i>Winchester (Bishop of) v. Four-nier</i> , 2 Ves. Sen. 445. | |

parties, will be restrained from taking out execution upon any judgment he may obtain (1).

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7. The Court will not relieve, by way of indemnity for losses on a bill negotiated before notice of the failure of the consideration—as, for instance, a guaranteed article which turns out worthless—the remedy is at Law by an action for damages for a breach of warranty, unless there are signs of a charge of having knowingly sold a worthless article, the consideration for the bill of exchange (2). The Court will restrain the negotiation of a bill of exchange given for goods not delivered (3).

8. If a firm would have accepted bills of exchange, whether they had seen bills of lading or not, stated to be held as security, and there has not been any representation as to the genuineness of the bills of lading, which turn out to be forgeries, the Court will not relieve the acceptors (4).

9. Where an absolute note is given, but from accompanying circumstances, it appears that the note is to be collected only on a contingency which has not occurred, Equity will grant relief (5). Equity will, in general, enjoin the transfer of a specific thing, which if transferred, will be irretrievably lost; as in the case of negotiable securities and stocks (6). So where a person has negotiable securities in his possession under a void contract, and is not of sufficient responsibility to answer for the value thereof, the negotiation of them will be restrained (7).

10. Relief, on the principle of correcting abuses of confidence will be given against the liability of a maker of a promissory note—as, for instance, to a patient against a note given by him to his medical attendant—where such a note has been given under undue influence, still the note will be retained as a security for what shall prove to be justly due (8).

(1) *Bainbridge v. Hemingway*, 12 L. T. (N. S.) 74.

398; 24 L. T. (N. S.) 286.

(2) *Jackson v. Shanks*, 15 W. R. 55; 12 Jur. (N. S.) 917; *vide Anglo-Danubian Co. v. Rogerson*, L. R. 4 Eq. 3.

(5) *Clayton v. Lyle*, 2 Jones, Eq. 188 (Amr.)

(6) *Osborn v. Bank, &c.*, 9 Wheat. 738 (Amr.).

(3) *Patrick v. Harrison*, 3 Bro. C. C. 476.

(7) *DeLafield v. Illinois*, 2 Hill. 159 (Amr.).

(4) *Leather v. Simpson*, 19 W. R. 431; 40 L. J. (Ch.) 177; L. R. 11 Eq.

(8) *Billage v. Southee*, 9 Hare, 534; S. C. *sub. nom. Billing v. Southee*, 21 L. J. (N. S.) Ch. 472; 16 Jur. 188.

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11. Although Courts of Equity have a concurrent jurisdiction with Courts of Law in relieving against promissory notes taken when overdue (1); yet if the equities disclosed will furnish a clear defence at Law, a Court of Equity will not interfere to restrain actions on the notes (2).

12. The acceptor of a bill of exchange, who has, by the hands of the drawer, as his agent, paid the amount of the bill after it had become due to an indorsee for value, without procuring it to be delivered up, who afterwards indorses the bill to another person without consideration, in order to recover the money from the acceptor a second time, will be relieved in Equity against an action on the bill for the amount (3).

13. It would seem, that where parties intend that a promissory note shall be joint and several, but through ignorance it is expressed to be joint only, a Court of Equity will relieve as well against the surety as the principal (4).

14. The drawer of a bill cannot enjoin an innocent holder from collecting it of an accommodation acceptor, on the ground of fraud in the payee (5).

15. A Court of Equity will not allow a bill discounter, who has obtained from a young man at college bills of exchange, I. O. U.'s, &c., for money advanced at high rates of interest, to take advantage of them; notwithstanding an acknowledging by the debtor that the account between himself and the money lender has been settled; the Court will only allow the moneys actually advanced, with interest at £5 per cent., and the securities will be ordered to be delivered up and cancelled (6).

16. It is a fraud on the bankrupt laws for any creditor secretly to bargain for or obtain a larger dividend than the other creditors; and this principle applies to a secret bargain after the bankruptcy, and before any composition under arrangement clauses is agreed to; and a bill of exchange to secure to one creditor a larger dividend than that received by the other creditors under the arrangement clauses, made by private agreement before the

(1) *Hodgson v. Murray*, 2 Sim. 515;
3 Sim. 283.

(5) *Winn v. Wilkins*, 35 Miss. 186
(Amr.).

(2) *Jones v. Lane*, 3 Y. & Coll. 281.

(6) *Croft v. Graham*, 9 Jur. (N. S.)
1032; 9 L. T. (N. S.) 589.

(3) *Earle v. Holt*, 5 Hare, 180.

(4) *Rawstone v. Parr*, 3 Russ. 424.

composition under the arrangement clauses is made, is illegal and void, and will be ordered to be delivered up (1).

17. A Court of Equity will restrain the negotiation of a bill of exchange by a holder who has given valuable consideration for it, but who has notice that it had been improperly accepted by a partner of the plaintiff in the partnership's name (2).

18. The Court will restrain the negotiation of bills void in their creation (3). A bill of exchange given to secure procuration money agreed to be given to the colonel of a regiment for a commission is void, and the Court will interfere even after the money is in the hands of the sheriff on an execution at Law (4).

19. The negotiation of bills of exchange and promissory notes given for a marriage brocade consideration will be restrained, within the reason of cases where there have been probates of false wills, surreptitiously obtained, where the Court has restrained the executors from parting with the assets *pendente lite* (5). For otherwise the plaintiff in such cases would be without remedy, if the note were disposed of for valuable consideration, and without notice (6).

20. To set aside bargains at Law fraud must be proved; but Bonds. Equity relieves against presumptive fraud (7). And a Court of Equity will relieve against a demand founded on an unconscionable bargain and contract, and will restrain proceedings at Law and relieve against the penalty of a bond obtained on such a bargain, upon payment of what is due (8). In almost every case upon the subject of advantages gained by fraud and breach of trust, a principal ingredient is a degree of weakness short of legal incapacity, and no relief will probably be given, if the Court does not consider the party whose bond or other security or contract it is desired should be set aside, or relieved against, as more liable to imposition than the generality of mankind (9).

(1) *Mare v. Sandford*, 1 Giff. 288; Amb. 66; *Cotton v. Catlyn*, 2 Eq. 5 Jur. (N. S.) 1339. Abr. 525.

(2) *Hood v. Aston*, 1 Russ. 412. (6) *Ib.*

(3) *Lloyd v. Gurdon*, 2 Sw. 180. (7) *Earl of Chesterfield v. Jannssen*,

(4) *Whittingham v. Burgoyne*, 3 1 Atk. 352.
Anstr. 900. (8) *Ib.*

(5) *Smith v. Aykwell*, 3 Atk. 566; (9) *Griffin v. Deveuille*, 3 P. Wms. S. C. sub. nom. *Smith v. Haytwell*, 130, n. (1), 5th Ed.

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21. A bond against the law of nature, as to prohibit a son from cherishing his mother, will be relieved against (1). A bond given as a remuneration for having assisted the obligor in effecting an elopement and a marriage without the consent of the friends of the wife, will be declared void (2). A bond given as a reward for using influence over another's estate for the benefit of the obligor will also be decreed to be delivered up (3). So marriage brocage bonds will be set aside; such bonds are not to be countenanced (4).

22. Bonds for procuring admittance into the service of the Crown will be relieved against (5). Bonds and engagements of this nature are highly to be discouraged. Merit, industry, and fidelity ought to recommend persons to places under the Crown, and not interest. Such instruments are a fraud on the public, and would open a door for the sale of such offices. They take away from the officer what the Treasury think to be but a reasonable reward for the care and trouble of the officer, and an encouragement to his fidelity, and must needs be of the most pernicious consequence, and induce the officer to make it up by some unlawful means, such as corruption and extortion; wherefore since engagements of this kind are likely to occasion corruption and extortion in offices, by having the profits of places separated from the places themselves, a bond given for such a purpose will be ordered to be delivered up, and a perpetual injunction awarded thereon (6).

23. Though Equity will in some cases carry a debt secured by a bond beyond the penalty, as where a man is kept out of his money by an injunction, or is prevented by an injunction from going on at Law (7)—except it be for a short time only (8)—there being no misconduct on the part of the creditor (9), yet (subject to such exceptions), where a man has judgment for the

(1) *Trailton v. Trailton*, 1 Vern. 413, 414.

(2) *Williamson v. Gihon*, 2 Sch. & Lef. 357.

(3) *Debenham v. Ox*, 1 Ves. 277.

(4) *Smith v. Bruning*, 2 Vern. 392; *Drury v. Hooke*, 1 Vern. 412; 2 Ch. Ca. 176; *Arundel v. Trevillian*, 1 Ch.

Rep. 187; *Keat v. Allen*, 2 Vern. 588; *Anon.*, Prec. Ch. 267; *Semb.* S. C.

(5) *Law v. Law*, 3 P. Wms. 391.

(6) *Ib.*

(7) *Duval v. Terry*, Show. P. C. 15.

(8) *Denny v. Lord Enniskillin*, 2 Moll. 535.

(9) *Grant v. Grant*, 3 Russ. 598.

penalty of a bond, though the principal and interest exceed the penalty, he shall recover no more than the penalty (1). No interest will be allowed beyond the penalty of the bond, except on special grounds (2).

24. Where the penalty of a bond is inserted merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed, and the penalty only as accessional, and therefore only to secure the damage really incurred. This rule is too strongly established in Equity to be shaken, and Equity will grant an injunction against a suit for the recovery of the penalty (3). So if the penalty is to secure the not doing of an act, the penalty is not to be considered the price for doing that act; but a Court of Equity will relieve by injunction until the actual damage is ascertained (4). Equity will not suffer a penalty to be demanded, if the party will perform that, for the non-performance of which, the penalty is given (5). And if a defendant, having the plaintiff in execution, refuse to discharge him without payment of the penalty, the defendant will be decreed to refund all he has received, except principal, interest, and costs (6). So Courts of Equity will relieve against the penalty of a bond in cases of fraud (7). So in cases of *post-obit* bonds (8). Sureties are relievable against the penalties of bonds (9).

25. An assignee of a bond, assigned in order to secure a debt antecedent to the bond debt, without notice of fraud by the assignor, will not be restrained from assigning it; for a *bonâ fide* purchaser of a bond without notice will not be restrained from dealing with it (10).

26. Bonds given to restrain acts inseparably incident to an

(1) *Stewart v. Rumball*, 2 Vern. 509; *Bidlake v. Arundel*, 1 Ch. Rep. 95; *Davis v. Curtis*, 1 Ch. Ca. 226.

(2) *Clarke v. Seton*, 6 Ves. 411; *S. P. Ex parte Mills*, 2 Ves. Jun. 301; *Grosvenor v. Cook*, Dick. 305; *Gibson v. Egerton*, Id. 408; *Kettleby v. Kettleby and Rundle v. Pettit*, Id. 514.

(3) *Sloman v. Walter*, 1 Bro. C. C. 418.

(4) *Hardy v. Martin*, 1 Cox, 26.

(5) *Hele v. Hele*, 2 Ch. Ca. 88.

(6) *Friend v. Burgh*, Finch, 437.

(7) *Duval v. Terry*, Show. P. C. 15.

(8) *Chesterfield (Earl) v. Janssen*, 2 Ves. Sen. 125; *Hill v. Caillouel*, 1 Ves. Sen. 122, 4th Ed.

(9) *Cary*, 12.

(10) *Ashwin v. Burton*, 9 Jur. (N. S.) 319; 11 W. R. 103.

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estate are idle bonds—as a bond from a tenant in tail not to commit waste (1). So of a recognizance conditioned that a tenant in tail should not bar the estate tail (2); such instruments are not binding in Equity, and will be decreed to be delivered up (3). But Equity will quiet a person in possession of entailed lands, to whom they have been given by the obligee of a bond—a tenant in tail, who has taken other lands in lieu of the entailed lands, which he has entered into, upon condition to permit that person to enjoy the entailed lands—until six months after an infant tenant in tail has come of age, with liberty to the infant then to shew cause (4).

27. Bonds in restraint of marriage will be decreed to be delivered up (5). Equity will relieve a husband, by repayment from his wife's estate of the amount secured by a bond for payment of his wife's debts, entered into by him, upon which he has been sued (6).

28. If a party has obtained the delivery up of promissory notes, upon which his wife was liable at her marriage, upon giving a bond for the amount, and he plead infancy to an action on the bond, he will be ordered to return the notes (7).

29. If by mistake, the name of an intended surety is omitted from a bond, although the intended surety is not bound by Law on this security, yet Equity will compel him to give a fresh one (8).

30. A Court of Equity will not, after a verdict at Law on a bond, aid the obligor in giving him a discovery whether the bond was not given upon an agreement to cohabit with the obligor as his wife. The necessity for the interposition of a Court of Equity is entirely taken away when all that matter that would have avoided the bond might have been, and has, in fact, been pleaded at Law (but the plea has not been supported); for a bond in consideration of future cohabitation is void at Law. A plaintiff in such a case has no right to call upon the defendant to discover

(1) *Jervis v. Bruton*, 2 Vern. 251. 2nd Ed.

(2) *Poole's Case*, cited in *Tutton v. Molleneux*, Moore Rep. 809, 810. (6) *Lewis v. Nangle*, Ambl. 151.

(3) *Jervis v. Bruton*, *supra*. (7) *Clarke v. Cobley*, 2 Cox, 173.

(4) *Thomas v. Gyles*, 2 Vern. 232. 309. (8) *Crosby v. Middleton*, Prec. Ch.

(5) *Baker v. White*, 2 Vern. 215,

that turpitude which was common to the plaintiff, the obligor, and to the defendant, the obligee; and Equity cannot compel the obligee to discover whether before the connection she capitulated with the defendant at Law for this provision; that would make her liable, not only to the reproach, but to the consequence of having lived in this illicit course of life (1). But a bond to secure provision for a woman and her children after cohabitation has ceased, is good (2). So a voluntary bond given to a common woman, after keeping her, will not be relieved against (3). It is clear that a plaintiff in such a case is not entitled to relief (4). The cases which have been determined against securities given to common prostitutes go upon the circumstance of the securities being given previous to the cohabitation, a consideration which, being *turpis* in its nature, the Court has relieved against them. In such a case as the above the bond is not given for a consideration, but is voluntary; the resort to the obligee being before the bond was given, and past services are no consideration at Law for future gifts (5). There is no principle in Equity which says a man may not give a voluntary bond to a common prostitute after the commerce had; it would be going but a little further to say that he could not give her money without her being liable to be called upon for it (6). Equity has never laid down a rule where any persons are unfit to receive a gift; every person who has a hand may receive one (7).

31. A Court of Equity will relieve against bonds executed for a sum of money lost at billiards; such bonds are void (8). So the Court will relieve against a bond given for money won at play; and if a part of the money is paid, it will order the money to be repaid (9). But Equity will not relieve against a bond for money won at billiards, which has been assigned with the privity of the obligor, and upon his assurance that the bond was

(1) *Franco v. Bolton*, 3 Ves. 368.(5) *Ib.*(2) *Knye v. Moore*, 2 Sim. & S. 260;(6) *Ib.*S. C. *sub nom.* *Knye v. Moseley*, 3(7) *Ib.*L. J. (Ch.) 136; *Spicer v. Hayward*,
Prec. Ch. 114.(8) *Kenny v. Browne*, 3 Ridg. P. C.
514.(3) *Hill v. Spencer*, Ambl. 641,
App. N. 836, 2nd Ed.(9) *Rawden v. Shadwell*, Amb. 269;
vide Woodroffe v. Farnham, 2 Vern.(4) *Ib.*

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valid, together with part payment of the money by the obligor, and entering satisfaction on a judgment obtained on the bond, and accepting a new security for the remainder of the debt, at the instance of the obligor (1).

32. A bond given to a counsellor to give him half of an estate if he recover it, will be declared void (2). Bonds obtained by undue parental influence will be set aside (3).

33. If the receipts and payments are on both sides, and the transactions are complicated, and there is no settled account, a Court of Equity will restrain an action on a bond to secure moneys paid and advanced (4).

34. Although a bond be given with the intention that it shall be used as a negotiable instrument, yet if there be nothing on the face of the bond to shew such intention, the assignee of the obligee takes it subject to the subsisting equities in favour of the obligor; a bond not being a negotiable instrument, although it may upon its face be made so (5).

SECT. 8. *Shipping, Shipments.*

1. The effect of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), ss. 70, 71, upon the *status* of a mortgagee of a ship is as follows:—It first declares that the mortgagee is not the owner, then that the mortgagor has not ceased to be the owner, then that the mortgagor shall be the owner, save so far as may be necessary for making the ship an available security for the mortgage debt (6). Therefore a mortgagor of a ship remaining in possession has full power to enter into contracts with respect to the ship, provided they do not impair the security; and in such a case, the mortgagees being bound by the contract, the Court will, at the suit of charterers, restrain the mortgagees from dealing with

(1) *Kenny v. Browne*, 3 Ridg. P. C. 514.

(2) *Skapholme v. Hart*, Cas. temp. Finch. 477.

(3) *Carpenter v. Heriot*, 1 Eden, 338.

(4) *Edwards-Wood v. Baldwin*, 4 Giff. 613; 9 Jur. (N. S.) 1280.

(5) *Graham v. Johnson*, 38 L. J. (Ch.) 374; L. R. 8 Eq. 36; 17 W. R. 810; 20 L. T. (N. S.) 77.

(6) *Collins v. Lamport*, 4 De G. J. & S. 500; 11 Jur. (N. S.) 1; 11 L. T. (N. S.) 497; 13 W. R. 283; 34 L. J. (Ch.) 196.

the ship in any manner inconsistent with, or which might interfere with or prevent the execution of the charterparty (1). Every contract entered into by the mortgagor in possession, is a contract which derives validity from the declaration contained in the statute of his continuing to be the owner. Such contract will, however, enure for the benefit of the mortgagee, on his giving notice to the party who is to pay the mortgagor under that contract. Subject to the above qualification, if a mortgagor of a ship does some act which prejudices or injures the security of a mortgagee, the declaration in the 17 & 18 Vict. c. 104, ss. 70, 71, that the mortgagor is to be deemed the owner, ceases to have any binding effect against the mortgagee, and he may exercise the powers given to him by the mortgage (2).

2. Where the terms of a charterparty will not damage the security, a Court of Equity will restrain any dealings with the ship inconsistent with those terms (3).

3. Although the Court will not affirmatively enforce the specific performance of a charterparty, yet it is implied in such a contract, that if a charterer provides a cargo, the ship shall not be employed for any other purpose, and a mortgagee with notice of a prior charterparty effected with the mortgagor will, in general, be restrained from doing anything to prevent its performance (4). Where, however, a mortgagor in such case is unable to put the ship in proper repair to make the voyage, or otherwise to perform the contract, and the charterer takes no steps for several months with respect to it, the contract is virtually at an end upon the mortgagee taking possession of the ship, and the mortgagee will not be restrained from exercising the powers contained in his mortgage (5).

4. The deposit of the instrument of mortgage takes the ship out of the order and disposition of a bankrupt, and constitutes a creditor, equitable mortgagee of the ship (6).

5. It would appear that a mortgagee of a ship taking possession

(1) *Collins v. Lamport*, 4 De G. J. & S. 500; 11 Jur. (N. S.) 1; 11 L. T. (N. S.) 497; 13 W. R. 283; 34 L. J. (Ch.) 196.

(2) *Ib.*

(3) *Ib.*

(4) *De Mattos v. Gibson*, 4 De G. & J. 276; 5 Jur. (N. S.) 347, 555.

(5) *Ib.*

(6) *Lacon v. Liffen*, 9 Jur. (N. S.) 477; 32 L. J. (Ch.) 25, 315; 4 Giff. 75.

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of her, is entitled to use her and sail her, and upon doing so becomes an owner within the meaning of the Merchant Shipping Act (17 & 18 Vict. c. 104), and subject to all the liabilities consequent thereon; and consequently a mortgagee of a ship is improperly restrained by injunction from using the vessel. The Court, in dealing with the undertaking of the plaintiff as to damages, will take into consideration the loss of profit arising from non-user (1). But if a mortgagee of a ship take possession of her and use her for the purposes of a speculation which results in a loss, and subsequently sell her disadvantageously, he must himself bear such loss, and be charged with the value of the vessel at the time he took possession of her (2).

6. A mortgage of a ship at sea (the form of the Registry Act being observed) is valid, and a Court of Equity will restrain an improper indorsement on the certificate of registry of the ship (3).

7. The mortgagee of a ship, by bill of sale, who has omitted to procure an indorsement thereof on the certificate of registry, within the time required by the Registry Act after the return of the ship to port, the registered owner having after that time become bankrupt, has no equity, distinct from his legal rights, to restrain the sale of the ship by the assignees, the title of the ship, after the bankruptcy, depending upon the application of the rule of Law with regard to order and disposition (4).

8. A mortgagee of a ship and assignee of all charterparties and freight by way of further security, who takes possession of the ship before any freight has become payable from the charterers to the owners, is entitled to freight in priority to an assignee of freight under a charterparty, who knew of the mortgage (5).

9. The title of a *boná fide* assignee for value of a bill of lading must prevail over any claim by an unpaid vendor of the goods, and the Court will restrain the delivery of the goods otherwise than to

(1) *De Mattos v. Gibson*, 1 J. & H. 79; 7 Jur. (N. S.) 282; *et vide European and Australian Royal Mail Co. v. Royal Mail Steam Packet Co.*, 1 K. & J. 676.

(2) *Marriott v. Anchor Reversionary Co.*, 2 Giff. 457; 7 Jur. (N. S.) 713; 39 L. J. (Ch.) 122, 571.

(3) *Thompson v. Smith*, 1 Madd. 395.

(4) *Campbell v. Thompson*, 2 Hare, 140.

(5) *Brown v. Tanner*, L. R. 3 Ch. 597; L. R. 2 Eq. 806; 12 Jur. (N. S.) 791; 14 W. R. 911.

the assignee or his order, and will apply the proceeds of the goods in satisfaction of the assignee's claim (1).

10. The master of a vessel may sign bills of lading in favour of the shipper of goods, without production of the mate's receipts for the goods, if he is satisfied otherwise that the goods are on board the vessel, and has no notice that any one but the shipper claims any interest in them; and the holder for value of bills of lading so given has a better title than a prior indorsee of the mate's receipts; and a custom that a mate's receipts for goods shipped on board a vessel are negotiable instruments, and pass the property in the goods in the same manner as bills of lading, is invalid as against the shipowner or master (2).

11. The guardian of a registered infant owner of a ship has no power under the Merchant Shipping Act, sect. 99, to sell or mortgage the ship on behalf of the infant; and a mortgagee in such a case is not entitled to any other lien upon the ship, or the proceeds of the ship, or policy moneys which may be substituted for the ship, than the outlay which may have been advanced by him for necessary repairs (3).

12. An owner of a ship will be restrained from employing her inconsistently with or from doing any act inconsistent with a charterparty (4). And that, pending an inquiry whether there is any danger to the ship from the state of the cargo (5). The purchasers of a ship with notice of a charterparty entered into by the master duly authorized, will be restrained from interfering with the sailing of the ship in pursuance of the charterparty (6). Parties who have mutually bound themselves, will be restrained from doing any act inconsistent with a charterparty which they have entered into *bonâ fide* (7). And although a Court of Equity cannot decree the specific performance of a charterparty, yet it can restrain the parties from employing the ship in a manner inconsistent with the rights under a charterparty (8).

(1) *Coventry v. Gladstone*, L. R. 4 (N. S.) 837; 30 L. J. (Ch.) 457; 9 Eq. 493; 16 W. R. 304. W. R. 218; *Heriot v. Nicholas*, 12

(2) *Hathesing v. Laing, Laing v. Zeden*, L. R. 17 Eq. 92; 43 L. J. (Ch.) 233; 29 L. T. (N. S.) 734. W. R. 844.

(3) *Michael v. Fripp*, L. R. 7 Eq. 95; 38 L. J. (Ch.) 29; 19 L. T. (N. S.) 257; 17 W. R. 23. (5) *Heriot v. Nicholas, supra*.

(4) *Sevin v. Deslandes, supra*. (6) *Messageries Impériales Co. v. Baines*, 11 W. R. 322.

(7) *Sevin v. Deslandes, supra*. (8) *Le Blanch v. Granger*, 35 Beav. 187.

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13. Although a part owner is entitled to an account of the past earnings of a ship, the ship will not be restrained from sailing until security, according to the practice of the Admiralty Court, has been given for the plaintiff's shares (1). The sailing of a ship will not be restrained on the application of a part owner of a smaller ascertained share, the proper application is to the Court of Admiralty to compel the larger part owner to give security, a Court of Equity only interferes where the shares are unascertained (2). But still, in a proper case, it would seem that the Court has jurisdiction to restrain a ship from sailing on the application of a part owner, until security shall have been given by the other part owners to the amount of his share (3). The Court will not, at the suit of charterers, restrain a shipowner from using the ship inconsistent with the charterparty, if such an injunction would have the effect of compelling the plaintiffs to enter into an agreement which they had never entered into, and of forcing the defendant to enter into the same agreement by putting a constraint upon him (4).

14. The lien which exists for general contribution upon the goods of each freighter to individual loss by property thrown overboard for the safety of the ship, under the right of the masters to require security from each for his proportion of the loss, is not to be extended to an injunction against the master and shipowner, restraining them from delivering the cargo, receiving the freight, and parting with any share of the ship (5).

15. A master of a ship has no lien on the ship or freight for wages, or for any expenditure which he may make in the ordinary discharge of his duties as master, however necessary for the performance of the voyage. But the case becomes one of ordinary principal and agent where he makes a special contract, in itself *ultra vires*, in order to fulfil which, he incurs special expenses; if the owner adopts the benefit of that contract, he must, in Equity, also bear its burthens (6). And in Equity the master is first entitled out of the freight earned to be repaid the sums advanced,

(1) *Castelli v. Cook*, 7 Hare, 89.

(5) *Hallett v. Bousfield*, 18 Ves.

(2) *Halloran v. Donal*, 9 Ir. Eq. 187.
Rep. 217.

(6) *Bristow v. Whitmore*, 9 H. L.

(3) *Christie v. Craig*, 2 Mer. 137.

C. 291; Joh. 96; 28 L. J. (Ch.)

(4) *Adumson v. Gill*, 16 W. R. 639, 801.
306; 18 L. T. (N S.) 278.

and to be indemnified against bills drawn by him upon the owner, to meet the said expenditure, and the owner or his mortgagee is only entitled to the net freight after deducting these charges (1). If shipowners have had the benefit of a contract by the master, though not accepted by them, yet they are chargeable in Equity, to the extent of the benefit they have derived therefrom (2).

16. The deposites of a charterparty to secure a balance due by a depositor, are entitled to the whole freight due under the charterparty, as against a party who is entitled to part of the freight, but who permits the depositor (entitled to the other part) to hold himself out as entitled to the whole (3). If that party, in such a case, neglect to undeceive the deposites on the point as soon as he finds out that they have taken a security upon the faith of such apparent title, he is precluded from afterwards asserting any equity inconsistent with that title (4).

17. A master of a ship, who, having authority to employ the vessel on freight to the best advantage, but not to purchase a cargo on the owner's account, and being unable to procure remunerative freight, loads the ship with a cargo of his own, is liable to account to the owners for all profits made by the sale of the cargo, and not merely for a proper freight; and the general principle that a trustee cannot make a profit for himself by the use of the trust property, applies to an agent intrusted with a ship or other chattel for the purpose of using it for the owner's benefit (5).

18. If a vessel about to sail is advertised as a general ship, an intending shipper is not bound to inquire as to the existence of any charterparty, and a person who, without notice of any charterparty, has placed goods on board a vessel so advertised, is entitled to have his goods returned to him, if the captain refuse to sign bills of lading, except so as to be bound by a charterparty of which he knows nothing, and of which he has had no notice express or implied (6).

(1) *Bristow v. Whitmore*, 9 H. L. C. 391; *Joh. 96*; 28 L. J. (Ch.) 801.

(2) *Ashmall v. Wood*, 2 Jur. (N. S.) 827.

(3) *Mangles v. Dixon*, 1 Mac. & G. 437; 1 H. & T. 542.

(4) *Ib.*

(5) *Shallercross v. Oldham*, 2 J. & H. 609.

(6) *Peck v. Larsen*, L. R. 12 Eq. 378; 25 L. T. (N. S.) 580; 40 L. J. (Ch.) 763; 19 W. R. 1045.

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19. The Court of Chancery has a statutory jurisdiction to settle the amount of the liability of the owners of a vessel for loss of life occasioned by collision with another vessel at sea, and to distribute the same among the persons entitled, and to restrain actions against the owners touching the same matters (1). A part owner, who is a ship's husband, has not the right, as against other part owners, of making an assignment of the whole freight to secure moneys advanced to him, and the legal right to receive the freight is in the captain; and, in the absence of sufficient allegation and proof that he is about to misapply it, a Court of Equity will not grant an injunction to prevent the captain from receiving the freight, upon the captain undertaking not to apply the freight to any other than the proper purposes (2). If ship's husbands, who are part owners, privately stipulate with charterers for a commission for themselves, they will be restrained from interfering with the sailing of the ship after their dismissal as ship's husbands, upon the discovery of their underhand bargain by the other part owners (3).

20. Under the 17 & 18 Vict. c. 104, s. 79, the registry of a bill of sale which, though purporting to be valid, so that the registrar has no alternative but to register it, is, in fact, invalid, gives no title, even at Law, to the person thereby registered as sole owner of the ship (4); and the owner, upon proving that no *bonâ fide* sale of the vessel has taken place, is entitled to an injunction to restrain dealing with the vessel, and to the net proceeds of a sale of the vessel (5). And although it is doubtful whether under the Merchant Shipping Acts, 1854, 1855 (17 & 18 Vict. c. 104, s. 79, and 18 & 19 Vict. c. 91, s. 10), the Court of Chancery has jurisdiction to interfere with a title acquired at Law by the registration of a valid bill of sale of a ship, yet the 65th section of the 17 & 18 Vict. c. 104, does not deprive that Court of its ordinary jurisdiction to protect property during litigation (6). And if a

(1) *Glaholm v. Barker*, L. R. 1 Ch. 223; L. R. 2 Eq. 598; 34 Beav. 305; *vide* 17 & 18 Vict. cc. 104, 120; 25 & 26 Vict. c. 63; 9 & 10 Vict. c. 93; *General Iron Screw Collier Co. v. Schurmanns*, 1 J. & H. 180; 4 L. T. (N. S.) 138; 8 W. R. 732.

(2) *Guion v. Trask*, 1 De G. F. & J. 373; 3 Jur. (N. S.) 185.

(3) *Brennan v. Preston*, 2 De G. M. & G. 813.

(4) *Orr v. Dickenson*, Joh. 1.

(5) *Ib.*

(6) *Ib.*

person having no title to a ship procures it to be registered in his name, the Court will compel him to retransfer it to the rightful owner, and account for the earnings, even though there has been no fraud, and notwithstanding the 17 & 18 Vict. c. 104 (1).

21. The policy of the Ship Registry Act (8 & 9 Vict. c. 89) in disregarding interests not appearing on the register, is inapplicable both to the money arising from the sale of a ship and to the produce of the freight; and where a party who appears on the registry to be the absolute owner of a ship enters into an agreement for valuable consideration, admitting he is a trustee, and engaging to sell the ship and hand over the produce to the true owner, the Court—notwithstanding the 8 & 9 Vict. c. 89 (ss. 34–39) prevents the *cestuis que trust* from enforcing any right against the ship itself—will enforce the agreement (2). And the *cestuis que trust* are entitled to the purchase-money of the ship sold by their trustee (3); and the Court will also restrain the purchaser from dealing with the shares of a ship, or indorsing the transfer on the certificate of the registry, so as to insure the effective determination of the questions at the hearing (4).

22. The Ship Registry Act (8 & 9 Vict. c. 89) does not prevent a lien being created on the certificate of original registry of a ship, deposited by an unregistered owner to secure advances for the use of the ship; and a Court of Equity will restrain a party who, without a lawful title, procures himself to be registered as owner of a ship, from prosecuting a complaint made under sect. 30 against a party claiming such a lien, to compel him to deliver up the certificate of the ship's registry (5).

23. If a bill of sale of shares of a ship shew by indorsement it is not absolute but as a mortgage, but the registry is of an absolute sale, the original owner is entitled to redeem, and the Court will restrain a purchaser from the assignee, from registering his bill of sale (6).

24. The whole frame of the Ship Registry Acts negatives any

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| (1) <i>Holderness v. Lamport</i> , 29 Beav. 129. | (4) <i>Ib.</i> |
| (2) <i>Armstrong v. Armstrong</i> , 21 Beav. 78; 1 Jur. (N. S.) 859; 24 L. J. (Ch.) 659. | (5) <i>Clarke v. Batters</i> , 1 K. & J. 242. |
| (3) <i>Ib.</i> | (6) <i>Whitfield v. Parfitt</i> , 4 De G. & Sm. 240. |

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equity resulting out of the doctrine of notice, and an unregistered agreement therefore, with the registered owner of a ship, which the owner subsequently transfers for value to another person who has notice of the agreement, cannot be enforced either as against the ship or its proceeds; but still it may be that upon such a contract an action for damages can be sustained, and that actual fraud in such a case would be relievable in Equity (1). However, an alleged fraud by a purchaser, in obtaining possession of a bill of sale of a ship before the payment of the consideration, and by that means procuring himself to be made the registered owner, cannot be relieved against, by preventing the sailing of the ship by the purchaser (2). But now, by the operation of the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), s. 3, equities may be enforced against owners and mortgagees of ships, in respect of their interest therein, in the same manner as equities may be enforced against them in respect of any other personal property (3).

25. A Court of Equity will declare whether the *transitus* of merchandize at any time was then pending, and whether a notice of stoppage *in transitu* was effectual, and will, if such notice is effectual, make a declaration that, in Equity, the vendor of the goods giving the notice is entitled to a valid and subsisting charge for the money due in respect of the price of the goods, and will restrain any action to recover such moneys (4). And such a Court will in a proper case exercise jurisdiction by stopping goods *in transitu*, and restrain the sailing of the ship with the goods on board (5).

26. If a vessel has become unable to proceed on her voyage without repairs, the owners of goods shipped on board the vessel may obtain the assistance of the Court to restrain the captain from selling the cargo. But before a Court of Equity will grant such assistance, the plaintiffs must shew their title to the goods, and must settle with the captain for what is due to him, and

(1) *McCulmont v. Rankin*, 2 De G. Haymen, 2 H. & C. 918.
M. & G. 403; 8 Hare, 1.

(2) *Follett v. Delany*, 2 De G. & 481; 15 W. R. 1168.

Sm. 235. (5) *Newton v. Hubback*, 2 W. R.

(3) *Vide Lacon v. Liffen*, 4 Giff. 75; 339.
32 L. J. (Ch.) 25, 315; *Stapleton v.*

exonerate him from his contract to deliver the goods at their place of destination, and from all liability on the bills of lading (1).

27. An assignee of freight, giving notice of the assignment to the broker of the assignor, to whom the freight is to be paid, is entitled to restrain the payment of the same to the assignees in bankruptcy of the owner, for, after such assignment and notice, the freight is no longer in the order and disposition of the owner, and consequently does not, on his subsequently becoming bankrupt, pass to his assignees (2). And where a trader assigns a debt, the only person to whom notice of the assignment need be given, in order to vest a good equitable title in the assignee, is the party from whom the trader was to have received payment of the money. In other words, the party holding the property at the order and disposition of the trader (3).

28. A Court of Equity has jurisdiction to restrain proceedings in the Admiralty Court on a bottomry bond, with the view to the administration of justice in a more convenient form; and it will grant an injunction on that ground, where the proceedings in the Admiralty Court are not framed in the most effectual manner for the attainment of their purpose, and where the questions (particularly one of apportionment) are such as can be better tried in Equity (4). So such a Court possesses and will exercise jurisdiction over a bottomry bond in a case of fraud, and will, for that purpose, restrain proceedings upon the bond in the Admiralty Court; and it is not necessary, for the purpose of supporting an interlocutory injunction of that kind, that the Court should find a case which would entitle the plaintiff to relief at all events; it is sufficient if the Court finds, upon the evidence then before it, a case which makes the transaction a proper subject of investigation in a Court of Equity (5).

29. A bottomry bond executed by the master of a ship cannot be supported against the owners and their mortgagee claiming under a mortgage prior to the bond (6).

(1) *Rayne v. Benedict*, 10 L. J. 409; 5 Jur. 262; affirmed on appeal, (N. S.) Ch. 297; 5 Jur. 598. 3 Aug. 1841.

(2) *Gardner v. Lachlan*, 4 My. & Cr. 129; 8 Sim. 123; 6 Sim. 407. (5) *Glascott v. Lang*, 8 Sim. 358; 3 My. & Cr. 451.

(3) *Ib.*

(6) *Dowson v. Lyall*, 2 Ph. 323, n.;

(4) *Duncan v. McCulmont*, 3 Beav. 3 My. & Cr. 453, n.

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SECT. 9. *Specific Performance.*

1. An injunction will not be granted against the sale of goods or any chattels where specific performance of a contract for their sale cannot be enforced (1). So if there be a contract with reference to goods, which is of such a nature that Equity will not interfere to prevent anything being done which would or might prevent the performance of that contract, there will also be no injunction against the sale of the goods (2). Equity will not permit the violation of an agreement or contract for the exclusive right of sale and exhibition of specific goods in a space in a building over which the party giving that right has entire control (3).

2. A Court of Equity will not compel, nor will it grant an injunction to enforce, the performance of a contract for an agency (4). So it is impossible to give any relief where the agreement is one which, from its nature, cannot be specifically enforced, as, for instance, where it is contrary to one of the general principles of the Court, namely, that the Court cannot enforce specific performance of a contract by piecemeal (5); or where the terms of the agreement are too indefinite to be enforced in a specific performance suit (6). Where there has been an agreement—a direct and positive engagement—by a defendant, which goes to the root of the whole agreement, and the defendant has failed to perform his part, and the plaintiff has also failed to perform his part, a Court of Equity will restrain the defendant from bringing an action against the plaintiff for non-performance of his part until he (the defendant) shall have performed his own part; and that, although the Court has no jurisdiction to compel the defendant to specifically perform his part (7).

(1) *Fothergill v. Rowland*, 22 W. R. 42; L. R. 17 Eq. 132; 29 L. T. (N. S.) 414; 43 L. J. (Ch.) 252; *vide* *Heathcote v. North Staffordshire Railw. Co.*, 2 M. & G. 112.

(2) *Ib.*

(3) *Altman v. Royal Aquarium Society*, L. R. 3 Ch. D. 228.

(4) *Chinnock v. Sainsbury*, 6 Jur. (N. S.) 1318; 30 L. J. (Ch.) 409.

(5) *Merchunt Trading Co. v. Ban-*

ner, 19 W. R. 707; L. R. 12 Eq. 18; 40 L. J. (Ch.) 515; 24 L. T. (N. S.) 861; *Greenhill v. Isle of Wight (Newport Junction) Railw. Co.*, 23 L. T. (N. S.) 885; 19 W. R. 345.

(6) *Greenhill v. Isle of Wight (Newport Junction) Railw. Co.*, *supra*.

(7) *Acraman v. Price, Davies v. Price*, 18 W. R. 540; 19 W. R. 364; 24 L. T. (N. S.) 487.

CHAPTER III.

THE DOCTRINES AND PRINCIPLES AS APPLICABLE TO THE
INCIDENTS OF PROPERTY (REAL AND PERSONAL).SECT. 1. *Light, Light and Air—Easements—Trespass.*

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1. The foundation of the jurisdiction in Equity to interfere by way of injunction, in cases of ancient lights, is, that injury to property which renders it in a material degree unsuitable for the purposes to which it is applied, or to lessen considerably the enjoyment which the owner has of it. Such an injury is considered by a Court of Equity to be incapable of compensation in damages (1). But it would appear, that where the abridgment of light complained of does not materially interfere with the comfort of the persons complaining, and does not materially diminish the suitability of premises for the present purposes to which they are applied, the Court has no jurisdiction to interfere by injunction, on the ground of a diminution of light, which, having regard to a future possible destination of the property, may materially diminish its value (2). And it is not in every case in which an action can be maintained for the obstruction of ancient lights, that an injunction will be granted by a Court of Equity; but the standard of the amount of damages that calls for the exercise of the jurisdiction has not been defined with any certainty; however, the obstruction must be one that diminishes the value of the premises for the purposes for which they are used at the time (3). There must be substantial damage (4), such a material diminution of light as substantially to affect the comfort of the residents on

Light, Light
and Air.

(1) *Jackson v. Newcastle (Duke)*,
3 De G. J. & S. 275; 10 Jur. (N. S.)
688; 10 L. T. (N. S.) 635; 33 L. J.
(Ch.) 698; *Yates v. Jack*, L. R. 1 Ch.
295; 12 Jur. (N. S.) 305.

(2) *Ib.*

(3) *Jackson v. Newcastle (Duke of)*
supra.

(4) *Robson v. Whittingham*, L. R.
1 Ch. 442.

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the premises (1). But a man is entitled to the preservation of his ancient lights, even though he were not at the time using them for purposes requiring the full amount of light which he claims (2).

2. However, a Court of Equity interferes by injunction to prevent an injury in respect of a legal right, simply on the ground of the damage which may be produced to property, and the jurisdiction of the Court is not confined to restraining injury to the enjoyment and comfort in the occupation of property, and therefore it is not necessary that a party filing a bill for an injunction to restrain such an injury should be in the actual occupation of the property, nor is it necessary that he should continue to occupy it (3).

3. The Court will interfere to restrain apprehended injury where it is clear that the act intended to be committed would injure or destroy a clear legal right. And an obstruction of a lessee's ancient lights by the reversioner, however slight, which would injure the lessee in his business, will be restrained (4).

4. It makes no difference whatever whether a person has acquired the right to light by twenty years' user, or has acquired it by the disposition of the owner of the dominant and servient tenement, in either case the right is exactly the same (5). If the grant is accompanied by a covenant for quiet enjoyment, that covenant does not increase or enlarge the right of the covenantee, so as to entitle him to an injunction in Equity to restrain an obstruction where the damage is not sufficient to enable him to maintain an action at Law; but it is otherwise where the right to light claimed is not the ordinary easement, but one that comes into existence by an express covenant; in that case a Court of Equity will grant an injunction, without regard to the amount of damage (6).

5. If there is no case for an immediate injunction, the plaintiff

(1) *Kelk v. Pearson*, 19 W. R. 269, 655; L. R. 6 Ch. 809; 23 L. T. 358; 24 L. T. (N. S.) 890.

(2) *Younge v. Shaper*, 21 W. R. 135.

(3) *Wilson v. Towend*, 1 Dr. & Sm. 324; 6 Jur. (N. S.) 1109.

(4) *Herz v. Union Bank of London*, 2 Giff. 686; 1 Jur. (N. S.) 127.

(5) *Leech v. Schweder*, L. R. 9 Ch. 463, 472, 475; 22 W. R. 633, 293; 43 L. J. (Ch.) 487, 232; 30 L. T. (N. S.) 586.

(6) *Ib.*; *vide Tipping v. Eckersley*, 2 K. & J. 264; *Leech v. Schweder*, L. R. 9 Ch. 463; *Manners (Lord) v. Sutton*, 1 Ch. D. 673.

may be put upon terms to try the legal right (1). Or an injunction may be granted to prevent the obstruction of ancient lights, subject to the plaintiff establishing his right to the easement in an action (2). And in a case where the nature of the alleged obstruction does not require the preventive interposition before a trial at Law, and the legal right is doubtful, the Court will refuse an injunction (3). There cannot be a perpetual injunction in regard to lights in a case of disputed title, until the question has been settled at Law (4). Nor will an injunction be granted where the right is doubtful and the injury trivial, or easily compensated in damages (5). But the Court will not grant an injunction against darkening ancient windows in every case affecting the value of premises that will support an action; the effect must be that material injury, amounting to nuisance, which should not only be redressed by damages, but upon equitable principles prevented (6).

6. A plaintiff coming to the Court for an injunction to restrain an erection of new buildings by his neighbour, on the ground of interference with his light and air, must shew that his own residence will, by the obstruction, be rendered substantially less comfortable for purposes of occupation. But though an injunction be refused in such a case, the Court, if it appear that damages have been sustained, may, if it think fit, exercise its statutory jurisdiction (7), and direct an inquiry as to damages (8). The Court will not grant an injunction to stay building in a case of mere injury or inconvenience to property, or persons adjoining, or otherwise, except by agreement, or where the building is of such a nature as to stop up ancient lights (9). And it is not sufficient to say that a proposed building would alter the plaintiff's lights, for the law says that a building must be so near as to create a nuisance; and although it may be true that the value of the plaintiff's house might be reduced by rendering the

(1) *Smith v. Elger*, 3 Jur. 790.(7) *Vide ante*, p. 97, n. (2).(2) *Sutton v. Montfort*, 4 Sim. 559.(8) *Johnson v. Wyatt*, 2 De G. J. &(3) *Wystanley v. Lee*, 2 Sw. 333.

S. 18; 33 L. J. (Ch.) 394; 9 Jur.

(4) *Irwin v. Dixon*, 9 How. 10 (Amr.).(N. S.) 1333; *vide Swaine v. Great Northern Railw. Co.*, 10 Jur. (N. S.)(5) *Atkins v. Chilson*, 7 Met. 398

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(Amr.).

(9) *Morris v. Lessees of Lord Berke-*(6) *Att.-Gen. v. Nichol*, 16 Ves. 338.

ley, 2 Ves. Sen. 453.

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prospect less pleasant, that is no reason to hinder a man from building on his own ground (1). Although the Court will not grant an injunction to restrain an obstruction of ancient lights, merely because the effect of such obstruction is to render the plaintiff's house less cheerful; yet if the effect is to cause material annoyance to the inmates of the house in the ordinary occupations of life, and to deprive them of such an amount of light as they might reasonably calculate on enjoying, then the Court will interfere (2).

7. It is not every impediment to the access of light or of air which will warrant the interference of a Court of Equity by way of injunction, or even entitle the party alleging himself to be injured, to damages at Law. In order to found a title to relief in Equity, or even at Law, in respect of such an impediment, some material or substantial injury must be established, and the onus of proving the injury rests, of course, with the plaintiff (3).

8. An owner of ancient lights is entitled, not only to sufficient light for the purpose of his then business, but to all the light which he has enjoyed previously to the interruption sought to be restrained. And where an injunction is granted against obstructing the ancient lights of business premises, the Court ought not to make any declaration narrowing, or appearing to narrow, the right of the plaintiff to the quantity of light theretofore used by him for the purpose of his business (4). But the *quantum* of injury to ancient lights necessary, before a Court of Equity will interfere by granting relief generally, and with reference to a mandatory injunction, is not to be estimated by a limitation with reference to any particular use to which the premises were put at the date of the obstruction complained of (5).

9. The Court will interfere to protect a plaintiff whose personal comfort and enjoyment, and *a fortiori* one whose trade or business is prejudicially affected by the diminution of light, but if the obstruction has been partly completed, and no mandatory injunction

(1) *Fishmongers' Co. v. East India Co.*, Dick. 164. *v. Corbett*, 4 De G. J. & S. 764, 770; 11 Jur. (N. S.) 719.

(2) *Clarke v. Clark*, L. R. 1 Ch. 16; 11 Jur. (N. S.) 914; 35 L. J. (Ch.) 151. (4) *Yates v. Jack*, L. R. 1 Ch. 295; 12 Jur. (N. S.) 305.

(5) *Culcraft v. Thompson*, 15 W. R. 387. (3) *Curriers' Co. (Master, &c. of)*

is prayed for, the Court will, under its statutory jurisdiction (1), assess damages by way of compensation (2). But a suit to restrain the invasion of ancient lights by mandatory injunction (the obstruction being completed before the filing of the bill), cannot be sustained in the Court of Chancery for the purpose of recovering damages for the invasion, if the injunction is refused (3).

10. Where there is, substantially, interference with comfort, and diminution of light for carrying on business, so that substantial damages would be given at Law, the Court will restrain injury to ancient lights, and the fact that the amount of compensation is capable of being ascertained by a jury, does not prevent the Court from acting on the ground of irreparable mischief. In such a case there is no essential difference in the amount of light and air that may be claimed in a town or in the country, and the Court will interfere, though the amount of sky area abstracted is small, if its proportion to the previous amount of sky is such that the abstraction causes inconvenience. To establish a sufficient defence to a case of alleged injury of this description, the defendant must shew that for whatever purpose the plaintiff may wish to employ the light whilst the house retains its original character, there will be no material interference with it, and the following grounds of defence:—first, that the plaintiff will have, when his injury is complete, as much light and air as other persons have for the same purposes; secondly, that the plaintiff might avoid the injury by enlarging his windows; thirdly, that the plaintiff has been accustomed to use blinds to his windows; fourthly and fifthly, that a room used for a special purpose is not well adapted to that purpose, and that it has been so used without the knowledge of the defendant; and sixthly, that the defendant intends to cure the evil by building with glazed tiles, or other means for improving the light,—are insufficient (4).

11. It would seem that shutting out a man's house from the

(1) *Vide ante*, p. 97, n. (2).

(2) *Martin v. Headon*, L. R. 2 Eq. 425; 12 Jur. (N. S.) 387; 14 W. R. 723; 35 L. J. (Ch.) 602; 14 L. T. (N. S.) 585.

(3) *Calcraft v. Thompson*, 35 Beav.

559; 15 W. R. 387.

(4) *Dent v. Auction Mart Co.*, *Pilgrim v. Auction Mart Co.*, *Mercers' Co. v. Auction Mart Co.*, L. R. 2 Eq. 238; 12 Jur. (N. S.) 447; 14 W. R.

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view of passers by is not a legal injury; and the erection of a building will not be restrained merely because it injures the plaintiff by obstructing the view of his place of business (1). And the Court will not restrain the erection of buildings which would intercept a prospect. There is no general rule of Common Law which says that building so as to stop another's prospect is a nuisance (2). The Court, in granting an injunction to restrain the building of houses which would obstruct the light and air so as to render a plaintiff's house uncomfortable to such a degree as would entitle him to recover substantial damages at Law, will in no degree be influenced by the consideration of any inconvenience from the loss of a prospect (3).

12. In cases of obstruction of ancient lights, where the Court is called upon to exercise its power of mandatory injunction, ordering the defendant to restore things to the condition in which they were before the old building was removed; each case must be decided upon its own peculiar circumstances (4). There is no rule which prevents the Court from granting a mandatory injunction where the injury sought to be restrained has been completed before filing the bill; and there is no difference in this respect between injury to easements and to other rights, the mere fact that the damage created by obstruction of light is completed before the bill is filed, is not of itself a sufficient ground for refusing a mandatory injunction; and in a case of obstruction of ancient lights, as in any other case of injury to easements, the Court looks to the particular circumstances of each case, but it will interfere by way of mandatory injunction, only in cases where extreme or very serious damage will ensue from non-interference (5). A Court of Equity will not interfere by mandatory injunction to preserve a right to light and air, unless there has been

(1) *Butt v. Imperial Gas Light Co.*, L. R. 2 Ch. 158; 14 W. R. 508; 15 W. R. 92; *et vide Smith v. Owen*, 14 W. R. 422.

(2) *Att.-Gen. v. Doughly*, 2 Ves. Sen. 453; and see *Fishmongers' Co., v. East India Co.*, 1 Dick. 165; see also *Aldred's Case*, 9 Rep. 58 a; *Webb v. Bird*, 10 C. B. (N. S.) 276.

(3) *Kelk v. Pearson*, 23 L. T. (N. S.) 458; 19 W. R. 269.

(4) *Isenburg v. East India House Estate Co.*, 3 De G. J. & F. 263; 10 Jur. (N. S.) 221; 33 L. J. (Ch.) 392; 9 L. T. (N. S.) 625; 12 W. R. 450.

(5) *Durell v. Pritchard*, L. R. 1 Ch. 244; *et vide Culcraft v. Thompson*, 35 Beav. 559; 15 W. R. 337.

a substantial, material, or serious infringement of such right (1). And if the inconvenience is not sufficiently serious, neither a mandatory injunction nor an inquiry to assess damages will be granted (2). Although the Court has jurisdiction to grant a mandatory injunction, it will not do so where the owner of the property injured by the material obstruction of the access of light and air to that property, has himself treated the case as one for compensation by damages. But the Court having that jurisdiction will direct an inquiry to assess damages, and will not leave the plaintiff to his remedy by action (3).

13. A Court of Equity will not restrain the construction of works obstructing lights, where the title to the property sought to be protected has not been accepted by the plaintiff. The plaintiff might, after obtaining the injunction, reject the title altogether, and that would not be consistent with the dignity of the Court (4).

14. So a tenant under an agreement for a lease is not entitled to an injunction to restrain his lessor from obstructing the ancient lights on the premises comprised in the agreement, unless he also ask to have the agreement specifically performed (5).

15. If the owner of a dominant tenement were, in the course of rebuilding, materially to alter his ancient lights, and to open new lights upon an additional floor, after communication with the owner of the servient tenement, and with the knowledge and under the inspection of the surveyor of the owner of the servient tenement, but without any express agreement; in Equity, the lights, as altered, would not be interfered with, on the ground of acquiescence alone (6). But in the absence of such acquiescence, the owner of the dominant tenement may alter ancient lights and add new ones, and still be entitled to restrain the obstruction of the ancient lights, by the servient tenement (7); and he will be

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| (1) <i>Beadel v. Perry</i> , 17 W. R. 185;
19 L. T. (N. S.) 760. | (5) <i>Fox v. Purssell</i> , 3 Sm. & G. 242. |
| (2) <i>Sparling v. Clarkson</i> , 17 W. R.
518. | (6) <i>Cotching v. Bassett</i> , 32 Beav.
101; 9 Jur. (N. S.) 590. |
| (3) <i>Gort (Viscountess) v. Clark</i> , 18
L. T. (N. S.) 343; 16 W. R. 569. | (7) <i>Staight v. Burn</i> , L. R. 5 Ch.
163; 39 L. J. (Ch.) 298; 13 W. R.
243; 22 L. T. (N. S.) 831; <i>vide</i> |
| (4) <i>Heath v. Maydew</i> , 13 W. R.
199. | <i>Tapling v. Jones</i> , 11 H. L. C. 290. |

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so entitled where he has materially enlarged his ancient lights within a recent period (1).

16. A plaintiff who has himself, in an insignificant degree, obscured the light and air to his own dwelling-house, is not thereby, disentitled to an injunction to restrain a defendant from erecting a building, so as seriously to diminish the supply of light and air (2).

17. Delay in moving for a decree—for instance, for three years after filing the bill, together with mutual acts of injury—disentitles to relief in Equity (3). So a delay of seven months, coupled with an offer at one time by the plaintiff to accept a sum as compensation, and the fact that very great damage would be caused to a defendant by an injunction, will disentitle a plaintiff to a mandatory injunction (4). But the Court will direct an inquiry as to the amount of damage sustained by the plaintiff (5). But a month's delay after the completion of the obstruction to the access of light and air, is not such a laches or acquiescence on the part of the owner of the adjoining property, when he is not himself in possession or occupation of it, as to disentitle him to a mandatory injunction (6).

18. If an offer is made which will have the effect of putting a plaintiff in as favourable a position as before the erection of the building or obstruction complained of, the Court ought not to interfere to compel the pulling down of such building, or to restrain its completion (7).

19. The twenty years' enjoyment under the Prescription Act (2 & 3 Will. 4, c. 71), ss. 3 and 4, is to be reckoned from the commencement of the enjoyment, to the time of bringing the action; and an interruption of the enjoyment, in whatever period of the twenty years it may happen, cannot be deemed an interrup-

(1) *Aynsley v. Glover*, L. R. 10 Ch. 283; L. R. 18 Eq. 544; 43 L. J. (Ch.) 777; 44 L. J. (Ch.) 523; 31 L. T. (N. S.) 219; 32 L. T. (N. S.) 345; 23 W. R. 147, 459.

(2) *Arcedekne v. Kelk*, 2 Giff. 683; 3 Jur. (N. S.) 114.

(3) *Cocks v. Romaine*, 14 L. T. (N. S.) 390.

(4) *Senior v. Pawson*, L. R. 3 Eq. 330; 15 W. R. 220.

(5) *Ib.*

(6) *Gort (Viscountess) v. Clark*, 18 L. T. (N. S.) 343; 16 W. R. 596.

(7) *Low v. Innes*, 10 Jur. (N. S.) 1037; 4 De G. J. & S. 286; 11 L. T. (N. S.) 217.

tion within the meaning of the Act, unless it is acquiesced in for a whole year (1). And if an obstruction to an ancient light has existed more than twelve months, but a promise has been given to remove the obstruction, and twelve months have not elapsed from the date of that promise, before proceedings are taken, that is not such an interruption of the enjoyment as will deprive the owner of the light of his remedy (2).

20. The owner of an ancient light, being a lessee whose lease has expired during the obstruction, but who has agreed for a renewal, can still maintain his suit for an injunction to protect his right to the access of light (3).

21. If a purchaser take with notice of adjoining windows, he is thereby put upon his inquiry as to whether they are privileged or not, and if privileged, it is immaterial whether they are so as modern windows by grant, or as ancient windows by prescription (4). If the windows are there before the defendant's eyes, they *primâ facie* present an obstacle to any building being placed so as to obstruct them, and they thus challenge an inquiry whether they are privileged or not (5).

22. A greater amount of evidence is needed to prove a material injury to light by lateral or oblique obstruction than is necessary in a case of direct obstruction, and that more especially when the buildings to the side are not erected upon what was previously an open space, but upon a space already to a very great extent obstructed by buildings (6). There is no such general proposition as that there can be no material injury to light if the angular elevation of buildings erected opposite, creating the obstruction of light, is not greater than forty-five degrees; but if forty-five degrees of sky is left open, that is some *primâ facie* evidence of the light not being obstructed to such an extent as to call for the interference of the Court—evidence which requires to be rebutted by direct evidence of injury (7).

(1) *Flight v. Thomas*, 8 Cl. & F. 231; West, 671; 5 Jur. 811.

(2) *Gale v. Abbot*, 8 Jur. (N. S.) 987.

(3) *Ib.*

(4) *Miles v. Tobin*, 16 W. R. 465; 17 L. T. (N. S.) 432.

(5) *Ib.*

(6) *City of London Brewery Co. v. Tennant*, L. R. 9 Ch. 212, 220; 43 L. J. (Ch.) 457; 22 W. R. 172; 29 L. T. (N. S.) 755; *Theed v. Deben-*

ham, 2 Ch. D. 165; 24 W. R. 775.

(7) *Ib.*

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Easements. 23. If a party claim an easement and prove only part of his claim, the easement proved constitutes a different easement from the one claimed, and the claimant cannot obtain relief in Equity (1).

24. Although that kind of understanding by which a customer, as long as he continues such, is allowed an easement, does not confer on him an equitable right, yet he is entitled to reasonable notice before being deprived of his easement. But if the customer has been encouraged by the owner of the servient tenement, to erect works to which the easement is essential, or nearly so, he will acquire an equitable right to the easement (2).

25. Mere knowledge of the manner in which property conveyed had been used by a vendor for the convenience of an adjoining tenement, will not affect the purchaser if the property is conveyed without reservation; and a grantor cannot claim rights over property absolutely granted, even if such rights were, at the time of the grant, continuous and apparent easements enjoyed in respect of an adjoining tenement, which remains the property of the grantor; and if an owner of two adjoining tenements convey one of them to a purchaser absolutely, the tenement so sold is discharged from any quasi-servitudes to which it was subjected by the vendor during his ownership of both properties, and the purchaser is not bound to take notice of the manner in which the tenement purchased has been used for the convenience of the adjoining and unsold tenement, and cannot be restrained from interfering with such quasi-servitudes (3). If a vendor of two adjoining tenements is subject to no liability as to a right of way through one of them, by the tenant of the other, the purchaser of one tenement cannot enforce that right of way as against the other purchaser (4).

26. The Court will protect a right of way from hindrance arising from a use of it by another party in such a manner—for instance, by loading and unloading waggons where there is not such an easement—as to obstruct that right (5).

(1) *Felkin v. Herbert*, 1 L. T. (N. S.) 173. L. J. (Ch.) 249; 12 W. R. 356; 4 De G. J. & S. 185.

(2) *Bankart v. Tennant*, 18 W. R. 639. (4) *Daniell v. Anderson*, 8 Jur. (N. S.) 328; 31 L. J. (Ch.) 610.

(3) *Suffield v. Brown*, 10 Jur. (N. S.) 111; 9 Jur. (N. S.) 999; 33 L. R. 8 Ch. 650, 657. (5) *Thorpe v. Brumfitt*, L. R. 8 Ch. 650, 657.

27. If two parties have rights which are reciprocal, and neither of which is paramount over the other, to use a roadway for their several trades, each must be bound to use his right so as to injure the other as little as possible; and the Court will restrain any stationary obstruction—for instance, that caused by carts standing at a store—caused by one of the parties, when the road is required to be used by the other party (1).

28. If a party grant a right of way over his land, and place across the way an obstruction not allowing of easy removal, the grantee may go round to connect the two parts of his way on each side of the obstacle over the grantor's land, without trespass, and the Court will protect this right so long as the obstruction exists, and notice of a right of way, and of an obstruction to it, is notice of the grantee's right of deviation (2).

29. A grant made expressly for the purpose of the grantee's building a house creates a legal easement over the adjoining land retained by the grantor, to such an extent as may be strictly necessary for enabling the grantee to build the house, and enjoy it when built; and where the grant does not notice the intention of building, but both grantor and grantee know that the purpose is building, an equitable right is obtained, co-extensive with the legal right which would have been obtained, if the grant had noticed the intention of building (3).

30. The right to an easement, conferred by a grant thereof, must be measured by the terms of the grant of the easement, and will be restricted by a Court of Equity to a reasonable use of the easement for the purpose of the land in the condition in which it was when the user took place (4). But in the case of proving a right to an easement by prescription, the user of the right is the only evidence, and the right acquired must be measured by the extent of the enjoyment which is proved (5).

(1) *Shoesmith v. Byerley*, 21 W. R. 669; 28 L. T. (N. S.) 553.

(2) *Selby v. Nettlefold*, L. R. 9 Ch. 111, 114; 43 L. J. (Ch.) 359; 29 L. T. (N. S.) 661; 22 W. R. 142.

(3) *Robinson v. Grave*, 21 W. R. 223, 225, 569; 27 L. T. (N. S.) 648; 29 L. T. (N. S.) 7.

(4) *Wood v. Saunders*, L. R. 10 Ch. 582, 584, 585; 32 L. T. (N. S.) 363; 23 W. R. 514; 44 L. J. (Ch.) 514; *Williams v. James*, L. R. 2 C. P. 577.

(5) *Williams v. James*, *supra*, 580, 581.

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31. The right of a person to the support of the land immediately around his house is not in the nature of an easement, but is the ordinary right of enjoyment of property; and till that is interfered with he has no legal ground of complaint, although, in fact, something may have been done which (without his knowledge) has occasioned results that will afterwards affect his property (1). A landowner has a right, independently of prescription, to the lateral support of his neighbour's land, so far as that is necessary to sustain his soil in its natural state, and also to compensation for damage caused, either to the land or to buildings upon it, by the withdrawal of such support. And a Court of Equity will restrain mining operations in adjoining land, which have injured houses upon the land, and would have caused the soil to subside without the additional weight of the houses, and under statutory jurisdiction will grant compensation for the damage caused by the withdrawal of the support (2). And although there may be no very precise decision upon the point of law, in the authorities, yet the *dicta* are strongly in favour of the proposition that the landowner might, where the houses are ancient, acquire by twenty years' enjoyment, the right to lateral support for the additional weight of buildings erected on the land (3).

32. Upon a conveyance of land for the express purpose of building, the right of working minerals being reserved to the vendor, the purchaser is entitled to support for his buildings, not only from underlying, but adjacent soil (4). And the same right exists, even though the conveyance is under the compulsory powers of a railway Act (5). Although as between conterminous owners, the lateral support of a neighbour's soil can only be claimed for the surface of the land in its natural state; yet if a person sell land to another to be used for an express purpose, he will not be allowed to derogate from his own grant, by doing anything in the adjacent soil which unfits the land sold, for the purpose for which it was sold. And in this case also, it makes no

(1) *Backhouse v. Bonomi*, 9 H. L. C. 503.

(4) *North Eastern Railw. Co. v. Elliott*, 7 Jur. (N. S.) 6; 8 W. R. 603;

(2) *Hunt v. Peake*, Joh. 705; *vide ante*, p. 97, note (2).

9 W. R. 172.

(5) *Ib.*

(3) *Hunt v. Peake*, *supra*.

difference that the land so sold was taken under compulsory powers (1). But the purchaser is not entitled to any additional support afforded by the accidental state in which the adjacent soil happens to be at the time of the purchase, however long it may have been in that state prior to the purchase (2).

33. If a purchaser of land have, on the sale, constructive notice that the adjoining land is to be laid out in building in a manner which will make a right of way over the purchased land, necessary to the vendor, such right of way is reserved to the vendor by implication as a way of necessity, and the purchaser will be restrained from disputing the right of way (3).

34. An easement may be acquired by the setting apart of land for certain specified public objects, and the public will thereby acquire rights and interests in such land, and they who have the legal title will hold it subject to the trusts of the land, and a Court of Equity will restrain them from committing any act which would be a breach of the trusts (4).

35. If the parties complaining of an interruption in their enjoyment of an easement are guilty of laches—for instance, a laches of one year and a quarter—and fail to institute proceedings to stop it until the new building has been completed, a Court of Equity will not grant an injunction to restrain the interruption, but will leave them to their remedy at Law (5).

36. A company is as much bound by acquiescence as an individual, notwithstanding the want of a formal contract. And the Court will restrain any violation of a right of way or communication, in which a company has acquiesced (6).

37. An injunction lies for one in possession of land to restrain the threatened appropriation of such land for the purpose of a highway, where the proper steps have not been taken to secure a suitable compensation to the plaintiff, or to protect him from an improper appropriation (7).

(1) *North Eastern Railw. Co. v. Elliott*, 6 Jur. (N. S.) 817.

(2) *Ib.*

(3) *Davies v. Sear*, L. R. 7 Eq. 427; 38 L. J. (Ch.) 545; 17 W. R. 390; 20 L. T. (N. S.) 56; *et vide* *Hervey v. Smith*, 22 Beav. 299; 1 K. & J. 389.

(4) *Com. v. Rush*, 14 Penn. 186 (Amr.).

(5) *Cooper v. Hubuck*, 7 Jur. (N. S.) 457; 9 W. R. 352.

(6) *Laird v. Birkenhead Railw. Co.*, Joh. 500; 29 L. J. (Ch.) 218.

(7) *Anderson v. Commissioners, &c.*,

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Trespass.

38. In cases of trespass, under colour of title, where the mischief apprehended is irreparable, a Court of Equity will grant an injunction; and whether the mischief be irreparable or not, it will by decree, if not by order upon motion, extend the jurisdiction of preventive justice to all cases of trespass in which damages would be an inadequate and uncertain remedy, and the protection of the right *in specie* the only mode of doing complete justice (1).

39. The Court will, by mandatory injunction, restrain a trespass by a stranger, the continuance of which will inflict irreparable damage upon persons in possession, and damage which it is impossible to measure will be deemed irreparable (2).

40. But it will refuse an injunction to restrain a trespass pending an action of ejectment by a plaintiff, where the case is not one of a sudden and irreparable injury, as for instance, the cutting of turf in a reclaimed bog (3).

41. Every common trespass is not a foundation for an injunction in a Court of Equity, where it is only contingent and temporary; but if a common trespass be continued so long as to become a nuisance or a constant grievance, the Court will restrain its continuation (4).

42. An injunction will not be granted to restrain a trespass, unless the trespasser is insolvent, or the injury irreparable and destructive to the plaintiff's estate—to its very nature and substance—and such as calls for immediate relief (5), at least, until the right is determined (6). There must be something particular

12 Ohio St. 642; *M'Arthur v. Kelly*, 5 Ohio, 140 (Amr.); *et vide Floyd v. Turner*, 23 Tex. 292; *Hall v. McLeod*, 2 Met. (Ky.) 98; *Langsdale v. Bonton*, 12 Ind. 467 (Amr.).

(1) *North Union v. Bolton and Preston Ry. Co.*, 3 Railw. Cas. 345.

(2) *London and North Western Railw. Co. v. Lancashire and Yorkshire Railw. Co.*, L. R. 4 Eq. 174; 17 L. T. (N. S.) 43; 15 W. R. 810; *vide Lowndes v. Bettie*, 33 L. J. (Ch.) 451; 10 Jur. (N. S.) 226; 12 W. R. 399; 10 L. T. (N. S.) 55; *ante*, p. 64; and note (2), same page.

(3) *Sandys v. Murray*, 1 Ir. Eq.

Rep. 29.

(4) *Coulson v. White*, 3 Atk. 21; *Whitfield v. Rogers*, 26 Miss. 48; 7 Ind. 408; *Moore v. Ferrell*, 1 Kelly, 7; *Schetz's, &c.*, 35 Penn. 88; *Carpenter v. Gwynn*, 35 Barb. 395 (Amr.).

(5) *James v. Dixon*, 20 Miss. 79; *Foster*, 6 Eng. 304; *Wilson v. Hughell*, 1 Morr. 461; *Catching v. Terrell*, 10 Geo. 576; *Shipley v. Ritter*, 7 Ind. 408; 5 Geo. 576; 26 Miss. 84; *Centreville, &c. v. Barnett*, 2 Cart. 536; *Brooks v. Diaz*, 35 Ala. 599 (Amr.).

(6) *Shurmeier v. St. Paul, &c.*, 8 Min. 113; *Whitman v. St. Paul, &c.*, 1b. 116 (Amr.).

or special in the case for which a Court of Law cannot afford adequate redress, and for which, either from difficulty of proof or some other cause, the party cannot obtain adequate satisfaction in the ordinary course of Law (1).

43. An injunction will be granted to restrain various acts of trespass committed against a plaintiff, and of annoyance to his tenants, by a pauper defendant, as recovering damages at Law against a pauper would not constitute an adequate remedy (2). But the Court will not interfere to prevent trivial trespasses; and does not exercise its jurisdiction by injunction for the purpose of acting on legal rights, but interposes in order either to enforce legal rights, or to prevent mischief, until the time shall arrive when those legal rights may be ascertained (3).

44. If a lessee for life commit waste (from the privity) by opening a mine in his own close, and dig a mine in the adjoining close of the lessor, not comprised in his lease, an injunction will be granted as to both closes; as to the lessor's close, first, from the irreparable ruin of the property as a mine; secondly, as it is a species of trade; and thirdly, upon the principle of a Court of Equity enjoining in matters of trespass, where irreparable damage is the consequence (4).

45. The Court will grant an injunction to restrain trespass, upon the principle of avoiding multiplicity of suits; as where the lord encloses part of the common, insisting that it is an improvement within the Statute of Merton, and that he has left sufficient common for the tenants; and the tenants throw open the inclosure by force; and the Court will continue the injunction pending the trial at Law, as to some of the defendants, whether they have a right of common, and also whether sufficient common is left (5).

46. Though the Court will not restrain an action of trespass against a company, by a party through whose estate a canal is being cut, for deviation from the line, on the ground that

(1) *Bethune v. Wilkins*, 8 Geo. 118; *Anthony v. Brooks*, 5 Geo. 576; 10 Geo. 576; *The Justices, &c. v. The Griffin, &c.*, 11 Geo. 246; 26 Miss. 84 (Amr.).

(2) *Hodgson v. Duce*, 2 Jur. (N. S.) 1014.

(3) *Saunders v. Smith*, 3 My. & Cr. 711.

(4) *Flamang's Case*, cited in *Hansom v. Gardiner*, 7 Ves. 308; 6 Ves. 147; 8 Ves. 90; 18 Ves. 186.

(5) *Arthington v. Fawkes*, 2 Vern. 356.

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he has lain by and rested upon his legal rights; still, if he file a bill to restrain such company from deviating, the Court will not, in a disputed case, grant a committal for an alleged breach of an injunction obtained by the plaintiff, without a trial at Law (1).

47. If a plaintiff allege that land and trees upon it belong to him, and that the trees are extremely ornamental to the mansion-house and park, the Court will restrain an alleged trespass by the cutting down of the trees, although the title is disputed (2).

SECT. 2. *Publication—Letters—Secrets.*

Publication.

1. A Court of Equity will punish, as for a contempt, those who make the publication of its proceedings the vehicle of a libel; but although it has the power of restraining the publication of its proceedings pending litigation, it will not undertake to restrain the publication of every unfair report purporting to represent what takes place in open Court. And a publication of such proceedings, though unfair, if not a libel, and not such as will obstruct the course of justice, will not be restrained (3). But pending litigation, a Court of Equity will restrain the publication by any of the parties to the suit, of *ex parte* garbled accounts calculated to prejudice the case of their opponents, of any of the proceedings in Court; and the circumstance that such publication is by way of defence, and in answer to similar publications on the other side, will not prevent the Court from granting the injunction (4).

2. The printing a brief before the cause comes on is a contempt of Court; not that the offence consists in the printing, for any man may give a printed brief, as well as a written one, to counsel; but the contempt of the Court is, the prejudicing the world thereby with regard to the merits of the cause (5).

3. A plaintiff obtaining information from the production of

(1) *Agar v. Regent's Canal Co.*, 1025; 29 L. J. (Ch.) 616; 8 W. R. Coop. 77. 688; 3 L. T. (N. S.) 571.

(2) *Kinder v. Jones*, 17 Ves. 110.

(4) *Coleman v. West Hartlepool*

(3) *Brook v. Evans*, 6 Jur. (N. S.) *Railw. Co.*, 8 W. R. 734.

(5) *The Case of Captain Perry*, cited 2 Atk. 471.

documents in the defendant's possession is not at liberty to make it public, and an injunction will, if necessary, be granted, to restrain him from so doing (1).

4. The Court will restrain the publication of facts, contrary to an agreement not to do so (2).

5. The right and property of an author or composer of any work, whether of literature, art, or science, in such work, unpublished, and kept for his private use or pleasure, entitles the owner to withhold the same altogether, or so far as he may please, from the knowledge of others; and a Court of Equity will interfere to prevent the invasion of this right; as, for instance, by restraining the publication of a catalogue containing a description of such work (3). Every author, before publication, has a common law right of property in his productions; and a public representation of a dramatic piece at a theatre is not such a publication as to deprive the author or his assignee of such right of property. And the publication and sale of the words and arrangements of a play, obtained from persons who have seen the play performed in another country, will be restrained. It is not open to a spectator, on witnessing the public performance of a play, to commit it to memory and then to publish it to the world. Any surreptitious procuring of the literary property of another, no matter how obtained, if unauthorized and without the knowledge or consent of the owner, and before publication by him, is an invasion of his proprietary rights, if made use of to his injury (4). So if a party obtain possession by purchase of works of art, knowing that they have been obtained by the vendor by means of a breach of trust; as, for instance, impressions of etchings, the plates of which are the property of another—the Court will interfere by injunction; and, without giving him the right to try the question of property at Law, will order the impressions to be delivered up; and where the material on which the impressions are taken are substantially worthless, except for that in which the

(1) *Williams v. Prince of Wales & G. 25; 1 H. & Tw. 1; 2 De G. & Life Co.*, 23 Beav. 338. Sm. 665; 3 Jur. 507.

(2) *Anon.*, 3 Jur. (N. S.) 685; (4) *Pulmer v. Dewitt*, 23 L. T. *Jamieson v. Teague*, 3 Jur. (N. S.) (N. S.) 823; Supreme Court, New York. 1206.

(3) *Prince Albert v. Strange*, 1 Mac.

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possessor had no property, namely, the impressions, the Court will order their destruction (1).

6. The Court, on the application of the representatives of a deceased author, will restrain the printing of an unpublished manuscript of that author, a copy of which has been given by the representative of the author to a person under whom the defendant claims, but not with the intention that he should publish it (2). But the Court will not restrain the publication of a work until after the plaintiff shall have established his right to the property by an action, if it has been left for a long period—for instance, for twenty-three years—by the author in the hands of the bookseller, to whom it was originally sent with an intention of its being published, although that intention was afterwards relinquished (3). The Court will not interfere by injunction, upon the author's application, to restrain the publication of a work which is of such a nature that an action cannot be maintained upon it for damages (4).

7. It would seem that unless there be a special contract, either express or implied, reserving to the author a qualified copyright, the purchaser of a manuscript is at liberty to alter and deal with it as he thinks proper (5).

8. Where there are two rival works, the Court will restrain the proprietor of one of them from advertising it in terms calculated to induce the public to believe that it is the other work; but will not restrain him from publishing an advertisement tending to disparage that other work (6).

9. A Court of Equity will restrain third persons from publishing lectures orally delivered (which have been substantially reduced into writing), who have procured the means of so doing from persons who attended the oral delivery (7); and a person who attends oral lectures is not justified in publishing them for profit, and an action will lie against him for doing so (8). But it is a question, whether there is any legal right of property in

(1) *Prince Albert v. Strange*, 1 Mac. & G. 25; 1 H. & Tw. 1; 2 De G. & Sm. 665; 3 Jur. 507.

(2) *Duke of Queensberry v. Shebbeare*, 2 Eden, 329.

(3) *Southey v. Sherwood*, 2 Mer. 435.

(4) *Ib.*

(5) *Cox v. Cox*, 11 Hare, 118.

(6) *Seeley v. Fisher*, 11 Sim. 581.

(7) *Abernethy v. Hutchinson*, 1 H. & Tw. 28.

(8) *Ib.*

the sentiments and language of a lecture delivered orally, which cannot be shewn to have been reduced into writing (1). However, persons who attend oral lectures, though not reduced into writing, and whether pupils or otherwise, will be restrained from publishing them, such publication being a breach of trust and violation of confidence (2).

10. The Court will not restrain one of the several partners in a patent from publishing a book containing an account of the invention (3).

11. The jurisdiction of a Court of Equity to restrain the Letters. production of letters is founded on a right of property in the writer (4). But the Court will not grant an injunction to restrain the publication of letters on a principle of this sort, that if a letter has been written in the way of friendship, either the continuance or the discontinuance of that friendship affords a reason for the interference of the Court (5). The publication of letters may be restrained, although not designed for profit (6). But the acts of the party may supply reasons for not restraining the publication of letters (7). Persons receiving letters may destroy them (8).

12. Where letters written by a plaintiff to the defendant have been returned by him, with a declaration that he did not consider himself entitled to retain them, the Court will restrain the publication of copies taken before the return, without the knowledge of the plaintiff, though represented by the defendant as necessary for the vindication of his character (9).

13. A Court of Equity will, on the application of an executor, restrain the publication of letters, the property of the testator (10). So it will restrain the executor of the person to whom they were written from publishing private letters, without leave of the executors of the persons who wrote them (11).

(1) *Abernethy v. Hutchinson*, 3 L. J. (Ch.) 209; 1 H. & Tw. 28.

(5) *Ib.* 413.

(6) *Ib.* 415.

(7) *Ib.* 427.

(8) *Ib.* 418.

(9) *Ib.* 403.

(10) *Granard v. Dunkin*, 1 Ball & B. 207.

(11) *Thompson v. Stanhope*, Amb. 737.

(2) *Ib.* (*et vide* 5 & 6 Will. 4, c. 65, which recognises a sole right of publishing lectures in the author thereof, and his assignees, subject to certain restrictions).

(3) *Hawkins v. Blachford*, 1 L. J. (Ch.) 142.

(4) *Gee v. Pritchard*, 2 Sw. 403.

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14. The Court will restrain the publication of letters, in a suit for that purpose, by an interlocutory injunction, although the plaintiff does not fully prove his title to relief; for to refuse the injunction would be to determine the whole suit, on an interlocutory application (1).

15. The Court will restrain the publishing a magazine as a continuation of the plaintiff's magazine in numbers, and will restrain the printing or publishing communications or letters received from correspondents by the defendant, while publishing for the plaintiff (2).

16. The insertion of detached extracts from a literary work, for instance, a farce, in a publication in the nature of a magazine or review, consisting of criticisms, and extracts to serve as a foundation for the criticisms, will not be restrained if the defendant has not transgressed the allowed limits, which, however, are not easily defined (3).

17. The publication of a public document to which everybody has a right of access, in a printed paper, does not constitute a libellous publication; and such publication will not be restrained (4).

18. If a party obtain the knowledge of a secret by means of a breach of trust on the part of the party communicating it—as, for instance, from one of former partners in a trade—a Court of Equity will restrain him from making use of it. Such knowledge of the secret having been acquired in violation of the contract of the party by whom it was communicated, and in breach of trust and confidence. A Court of Equity, in interfering in such cases, fastens the obligation on the conscience of the party and enforces it against him, in the same manner as it enforces against a party to whom a benefit is given, the obligation of performing a promise upon the faith of which the benefit has been conferred (5). But if a partner in a business, in which a secret process of manufacture and composition of materials is used, who has not, under the

(1) *Andrew v. Raeburn*, 31 L. T. (N. S.) 73; 22 W. R. 564; L. R. 9 Ch. 522. (3) *Whittingham v. Wooler*, 2 Sw. 428.

(2) *Hogg v. Kirby*, 8 Ves. 215. (4) *Fleming v. Newton*, 1 H. L. C. 363.

(5) *Morison v. Moat*, 21 L. J. (N. S.) Ch. 248; 9 Hare, 241.

partnership contract, a right to the knowledge of the secret, should openly take part in the manufacture, and should, with the knowledge and concurrence of his partners, be permitted to acquire a knowledge of the process and ingredients; it would be difficult for any of those partners afterwards to restrain him from using any knowledge so acquired, or any secret so disclosed; they would probably, in such circumstances, be considered to have waived any right to preserve the secret for their separate benefit (1). But when a person has discovered a valuable invention, and has not patented it, any one who has discovered the ingredients (independently of the case of a breach of trust or agreement, or of fraud, or the like) may sell those ingredients, and may use the name of the person who has discovered them, after his death, but not in his lifetime; however he must not use the name so as to suggest that they are made by the discoverer, or that they are the same as belonged to the discoverer, or that his is the only genuine article (2).

19. A Court of Equity will grant an injunction to restrain the disclosure of secrets obtained from the books and papers of the plaintiffs—for instance, a firm of attorneys—and of their clients, come to the defendant's knowledge in the course of his employment by the plaintiffs, and from communicating any of the information possessed or acquired by him relating to the co-partnership of the plaintiffs, or the affairs or secrets thereof, by means of his having been employed by them (3).

20. A Court of Equity will not interfere on points of morals, except when they are mixed up with the administration of civil rights in property; but confidential communications involving fraud are not privileged from disclosure (4).

21. Though the policy of the law will not permit a general restraint of trade, yet a trader may sell a secret in business, and restrain himself generally from using that secret (5).

(1) *Morrison v. Moat*, 21 L. J. *Cholmondeley (Lord) v. Lord Clinton*, (N. S.) Ch. 248; 9 Hare, 241. 19 Ves. 261.

(2) *James v. James*, L. R. 13 Eq. 421, 424; 41 L. J. (Ch.) 353; 26 L. T. (N. S.) 39; 26 L. J. (Ch.) 113.

(3) *Bryson v. Whitehead*, 1 Sm. & S. 74.

(4) *Evitt v. Price*, 1 Sim. 483; *vide*

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Account.

SECT. 3. *Account—Set-off.*

1. The equitable jurisdiction in matters of account is concurrent with that of Courts of Law, and no precise rule can be laid down as to the cases in which it will be exercised; a Court of Equity reserving to itself a large discretion upon the subject, in the exercise of which it will pay due regard to the nature of the case, and the conduct of the parties; thus it will not restrain an action already commenced where it is not a case of mutual accounts, and there has been delay in applying for the injunction until the period of the trial, merely on the ground that from the number and complexity of the items in the account, a judge at *nisi prius* would urge the parties to refer it (1).

2. A Court of Equity will endeavour to assume jurisdiction in matters of account where doing so will promote substantial justice between the parties, as where a plaintiff is unable to prosecute actions commenced by him, in consequence of his having been prevented by the defendant from obtaining a conclusive certificate as to the work done by him for the defendant. In such a case the Court will restrain actions by the defendant against the plaintiff for breach of the contract, and make a decree for an account (2). So if a plaintiff has done all which he had contracted to do, except what a defendant had prevented him from doing, and the plaintiff has not been fully paid for the work done by him, in consequence of a fraudulent and collusive certificate of an agent of the defendant having stated a less amount than what was due to the plaintiff, a Court of Equity will grant an injunction to restrain the defendant from attempting to put an end to the contract, and make a decree for an account; such a species of fraud gives jurisdiction to a Court of Equity, although the plaintiff may not have completed the whole of his work (3). But where it is unquestionable that a Court of Law can do as full justice to the subject in dispute as a Court of Equity, such a Court

(1) *South Eastern Railw. v. Martin*, 396.

2 Ph. 758; 1 H. & Tw. 69; 5 Railw. Cas. 454; 13 Jur. 1; 12 Jur. 1062.

(2) *Dabbs v. Nugent*, 11 Jur. (N. S.) 943; 14 W. R. 94; 13 L. T. (N. S.)

(3) *Waring v. Manchester, Sheffield, and Lincolnshire Railw. Co.*, 2 H. & Tw. 239.

will not interfere to stay the proceedings at Law (1). However, if there be any doubt about that, a plaintiff has a right to maintain his suit in a Court of Equity for an account, for when the completeness of the relief at Law is doubtful, and questions of account, of the right to raise a case of wilful default, and of fiduciary relationship between the parties are involved, such a Court will entertain a suit for the purpose of transferring the proceedings from Law to Equity (2); and if claims set up are such as would not be properly decided in an action, the Court will restrain the action; and a delay by the plaintiff in filing his bill, though much exceeding what in several instances a Court of Equity has deemed sufficient to disentitle a plaintiff to ask for an injunction, is no ground for refusing to interfere in a case where it is clear that a Court of Law cannot possibly deal with the subject matter (3).

3. There is a distinction between cases where a Court of Equity will entertain jurisdiction over a matter of account, and where such a Court will withdraw a matter of account from a Court of Law. There are many cases in which it seems, looking through the whole of the decisions, that a Court of Equity will properly entertain jurisdiction on the matter, where, if the party making a claim proceeded at Law, a Court of Equity would not, as a consequence, because it would itself exercise jurisdiction if appealed to, withdraw it from the jurisdiction of a Court of Law; and in certain cases, and where the account is of such a nature that it is thought justice could not be done at *nisi prius*, a Court of Equity will withdraw the matter, and take the exclusive conduct and decision of the case, although it is a subject of legal jurisdiction, and the demands on both sides are of a legal nature; and doing this, such a Court will either itself decide the matter, or, if it be matter of Law, and fit for the decision of a Court of Law, will put it into such a shape as to make the decision practicable,

(1) *Southampton Dock Co. v. Southampton Harbour and Pier Board*, L. R. 11 Eq. 254; 23 L. T. (N. S.) 698, 260; *Fluker v. Taylor*, 3 Drew. 183; *South Eastern Railw. Co. v. Brogden*, 3 Mac. & G. 8.

(2) *Southampton Dock Co. v. Southampton Harbour and Pier Board*, *supra*.

(3) *South Eastern Railw. Co. v. Brogden*, 3 Mac. & G. 8.

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where it is thought not to be so in the general form in which the claim might have been obtained (1).

4. A plaintiff is not entitled to the interference of a Court of Equity on principles of Equity, if there is nothing more in his case than matter of set-off, or other defence at Law, and even if he has a stronger case, it is too late to come to the Court for its interference after he has suffered an action at Law to be tried and determined at *nisi prius* (2).

5. The account which a Court of Equity adjusts must be one of debtor and creditor, and not an account of debts one way and of damages the other way. A Court of Equity will not take an account in any case where the subject, as to which the account on one side is required, would not be a matter of set-off at Law, though it does not follow that where there would be a set-off at Law there would necessarily be an account in Equity, the discretion of the judge must be exercised to see that the items of the account are proper for the consideration of a Court of Equity (3).

6. In cases between landlord and tenant, if there is a ground of defence which cannot be set up in ejectment for non-payment of rent, but which it is unconscionable in the landlord not to admit, or if an account be so complex that it cannot properly be taken at Law, a Court of Equity will restrain the action and restore the tenant to possession upon payment of what shall appear to be due (4).

7. A mere general allegation that there are mutual dealings and transactions between himself and his principal will not entitle the agent to an account, and an injunction to restrain the principal from proceeding in an action at Law to recover the amount due (5).

8. It is not every account which will entitle a party to the interference of a Court of Equity, it must be such an account as

(1) *South Eastern Railw. Co. v. Brogden*, 3 Mac. & G. 8.

(2) *Cooper v. Hatton*, 12 Pri. 502.

(3) *Glennie v. Imri*, 3 Y. & C. 436, 442, 444; 3 Jur. 432. (See "The Supreme Court of Judicature Act, 1875," Order 19, rule 3, which authorizes a set-off to be made against the claims of a plaintiff, whether it sound in damages or

not, subject to a discretionary power in the Court of disallowing such a set-off.)

(4) *O'Mahony v. Dickson*, 2 Sch. & Lef. 400; *Beasley v. D'Arcy*, 2 Sch. & Lef. 403, n.; *O'Conner v. Spaight*, 1 Sch. & Lef. 305.

(5) *Fricas v. Dos Santos*, 1 Y. & J. 574.

cannot possibly be taken justly and fairly in a Court of Law (1). So although a principal is undoubtedly entitled to an account in Equity from his agent, yet before such a Court will interfere, a ground for its interposition must be laid, by shewing an account which cannot be fairly investigated by a Court of Law (2).

9. The mere fact that an agent must in general be ignorant of a certain class of orders upon which he is entitled to a commission, does not enable him to file a bill against his principals for an account of what is due to him for such commission, his remedy is at Law (3).

10. The first duty of an agent, receiver, trustee, or executor, is to be constantly ready with his accounts, and if he neglect to render an account, and delay the distribution of the fund amongst those entitled, he will be charged with interest on the balance, and fixed with the costs of the suit (4).

11. After an account taken under a decree, a party will not be allowed to overhaul the account by bringing an action at Law on the same subject matter (5).

12. The mere existence of cross-demands is not sufficient, and Set-off. still less will a Court of Equity interfere, on the ground of equitable set-off, to prevent a party from recovering a sum awarded to him by a jury as damages for a breach of contract, merely because there is an unsettled account pending between him and the party against whom the action is brought, although the subject matter of the account consists of dealings and transactions arising out of the contract, the breach of which is the subject of the action (6). And if a suit is for an account of transactions under a contract, and the action asked to be stayed is for damages for the breach of the contract, the object and subject matters of the suit and action are totally distinct, and the fact that the agreement is the origin of both does not form any bond of union for the purpose of supporting an injunction to restrain proceedings in the action (7). Equitable set-off exists in cases where the party seeking the

(1) *Frietas v. Dos Santos*, 1 Y. & J. 574.

(5) *Bell v. O'Reilly*, 2 Sch. & Lef. 430.

(2) *King v. Rossett*, 2 Y. & J. 33.

(6) *Rawson v. Samuel*, Cr. & Ph.

(3) *Smith v. Leveaux*, 2 De G. J. & 161, 178.

S. 1.

(7) *Ib.* (see note (3), p. 228, ante).

(4) *Pearse v. Green*, 1 Jac. & W. 135.

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benefit of it can shew some equitable ground for being protected from his adversary's demand (1).

13. The equity of bills for an account to restrain actions for damages on the ground of set-off must impeach the title to the legal demand (2). But if the title to the legal demand of the defendant in a suit in a Court of Equity, is impeached in Equity, such a Court will restrain an action on the demand, as it is a fair question for a Court of Equity to determine (3).

14. There will be no set-off where debts are due in different rights, such a set-off cannot be made either at Law or in Equity (4). A party going into Equity to enjoin a judgment on the ground of set-off, must shew as strong a claim to be paid the set-off as if he were suing on it at Law or in Equity (5). An equitable set-off exists where there is a right of set-off in Equity, which would not be available as a defence at Law (6). A surety defendant at Law may, in a Court of Equity, set off a claim which has been allowed against the principal debtor (7).

SECT. 4. *Restraint of Trade—Business, Trades—Partnership—
Bankruptcy, Insolvency.*

Restraint of
trade.

1. A covenant restraining trade within particular limits, or partners from carrying on the same trade for their private benefit, is legal (8). There is no irrebuttable presumption against the legality of a covenant in general restraint of trade; and though all restraint which is unreasonable for the protection of the parties to a contract, is bad, yet public policy enables a contracting party to enter into any stipulation, however restrictive, if such stipulation is not unreasonable, having regard to the

(1) *Rawson v. Samuel*, Cr. & Ph. 161, 178.

(2) *Ib.*

(3) *Agra and Masterman's Bank v. Hoffman*, 11 Jur. (N. S.) 335; 34 L. J. (Ch.) 285.

(4) *Bishop v. Church*, 3 Atk. 691.

(5) *Walker v. Ayres*, 1 Clark, 449 (Amr.).

(6) *Jones v. Moore*, 4 Y. & C. 351.

(7) *Murphy v. Glass*, L. R. 2 P. C. 408; 6 Moo. P. C. (N. S.) 1; 20 L. T. (N. S.) 461; 17 W. R. 592.

(8) *Morris v. Colman*, 18 Ves. 437; *et vide Chesman v. Nainby*, 1 Bro. P. C. 234; 2 Str. 739; 2 Ld. Raym. 1456.

subject-matter of the contract (1). All the cases seem to establish this principle, that all restraints upon trade are bad, as being in violation of public policy, unless they are natural, and not unreasonable for the protection of the parties in dealing legally with some subject-matter of contract. The principle is this:—Public policy requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the state of his labour, skill, or talent, by any contract that he enters into. On the other hand, public policy requires that when a man has, by skill, or by any other means, obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market; and in order to enable him to sell it advantageously in the market, it is necessary that he should be able to preclude himself from entering into competition with the purchaser. In such a case, the same public policy that enables him to do that, does not restrain him from alienating that which he wants to alienate, and therefore enables him to enter into any stipulation, however restrictive it is, provided that restriction, in the judgment of the Court, is not unreasonable, having regard to the subject-matter of the contract (2). But a covenant embodying a restriction in restraint of trade, unlimited as to space, and greater than is necessary for the protection of the party in whose favour it is made, is, on the face of it, void (3). Contracts restraining the exercise of a trade or profession in particular localities, are valid when there is a fair and reasonable ground for the restriction, such contracts create a legal right, which a Court of Equity will enforce. Such a Court will enforce an implied contract of that nature within reasonable limits, *à fortiori* it will do so in the case of an express one (4). Where there is an express covenant, and an uncontroverted mischief arising from the breach of it, Equity will grant an injunction to restrain the breach, and the mischief arising from the breach of a covenant in restraint of trade, or a profession, for instance,

(1) *Leather Cloth Co. v. Lorsche*, 102; 27 L. T. (N. S.) 372; L. R. 15 L. R. 9 Eq. 345, 353; 18 W. R. 572; 39 L. J. (Ch.) 86; 21 L. T. (N. S.) 661.

(2) *Ib.*

(3) *Allsopp v. Whetcroft*, 21 W. R.

102; 27 L. T. (N. S.) 372; L. R. 15 Eq. 59; 42 L. J. (Ch.) 12.

(4) *McClurg's, &c.*, Leg. Intel. (Philadelphia), cited in Hilliard, *Inj.*, p. 615, 2nd Ed.

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restraining practice as a physician within prescribed limits, cannot be repaired, nor can it well be estimated. A suit at Law would afford no adequate remedy, and the damages would be continuing and accruing from day to day, and furthermore, the object of such contracts can only be obtained by the parties conforming expressly and exactly to its terms (1).

2. *Primá facie*, the sale by one partner of his share in a going business to the other partners imports a sale of the vendor's interest in the goodwill of that business (2). And a sale by one partner of his share in the business and goodwill to the other partners, disentitles the vendor from setting up the same business in the same place with others, and representing to the public the new as being the old firm, and he will be restrained from so doing (3). But it is perfectly settled that the mere sale of the goodwill neither implies a contract on the part of the vendor not to set up again in a similar business, nor restricts him as to the place of carrying on that business (4). The sale of a trade with the goodwill does not prevent the vendor setting up again in a similar trade, without an express covenant or contract, or, without fraud, by setting up the same trade in the same place, under the same sign or name, the party giving himself out as the same person; or by conduct, by standing by and giving encouragement, generating a confidence, that he would not engage in such a trade, inducing other persons to involve themselves (5). And the vendor of a business and goodwill must not solicit the customers of the old business to cease dealing with the purchaser, or to give their custom to himself (6). A Court of Equity will, by an injunction, enforce an understanding upon a good consideration, that a retiring partner shall not set up the same trade in the vicinity (7). But if a party obtain damages at Law by way of liquidated damages, for a breach of a contract in restraint of trade, a Court of Equity will not interfere by granting an injunction to restrain the breach, as,

(1) *McClurg's, &c.*, Leg. Intel. (Philadelphia), cited in Hilliard, Inj., p. 615, 2nd Ed.; *Butler v. Burleson*, 16 Vermont, 176 (Amr.).

(2) *Churton v. Douglas*, 5 Jur. (N. S.) 887; Joh. 174.

(3) *Ib.*

(4) *Ib.*

(5) *Crutwell v. Lye*, 17 Ves. 335.

(6) *Labouchere v. Dawson*, L. R. 13 322; 41 L. J. (Ch.) 427; 25 L. T. (N. S.) 894.

(7) *Harrison v. Gardner*, 2 Madd. 198.

in such a case, no contract then subsists, and the party applying for the aid of the Court by granting an injunction, has no legal right remaining (1). But notwithstanding a bond with a penalty is given in restraint of trade, the obligee is entitled to an injunction to restrain a violation of the act intended to be secured. The principle is this: that where a person enters into an agreement not to do a particular act, and gives his bond to another to secure it, the latter has a right at Law and in Equity, and can obtain relief in either Court, but not in both. He must choose the jurisdiction and the remedy he will have, but if there is any doubt as to the legal right, and the party comes into Equity, that Court will determine the legal right (2).

3. Equity will restrain the violation of an agreement in restraint of trade within a given area and time, although the party entering into that agreement be a minor at the time of doing so, if he represent himself to be of age, knowing that he is not so, and by his conduct obtain the benefit of the contract (3).

4. Any valuable consideration, however small, is sufficient to support any instrument, as for instance a bond, in restraint of trade, and that consideration may be inferred from the instrument (4).

5. A Court of Equity will restrain the circulation and issue of circulars and cards of business, which, although they may be literally true, tend to mislead the public into a belief that the defendant has succeeded to the plaintiff's business (5). A grant to a man and his heirs to the use, intent, and purpose that a certain trade or business shall not at any time be carried on upon the premises granted, amounts to a stipulation in the nature of a covenant running with the land, by the grantee, not to carry on such trade or business upon the premises; and a Court of Equity will restrain the grantee, his agents or servants, from committing breaches of such a stipulation, and also the tenant of the grantee, if such tenant be made a party to the suit (6).

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Business,
Trades.

(1) *Sainter v. Ferguson*, 1 H. & T. Eq. 518, 522; 43 L. J. (Ch.) 659; 30 383; 1 Mac. & G. 286; 14 Jur. 255. L. T. (N. S.) 863.

(2) *Fox v. Scard*, 33 Beav. 327. (5) *Harper v. Pearson*, 3 L. T.

(3) *Cornwall v. Hawkins*, 20 W. R. (N. S.) 547.

653; 26 L. T. (N. S.) 607; 41 L. J. (6) *Hodson v. Coppard*, 29 Beav. 4; 9 W. R. 9; 30 L. J. (Ch.) 20; 7 Jur.

(4) *Gravelly v. Barnard*, L. R. 18 (N. S.) 11.

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Partnership.

6. The arbitration clauses commonly inserted in partnership articles apply only to questions arising upon the construction of the articles, and to matters of internal dispute thereunder, and not to a case where it is charged that the partnership articles have been wholly broken through, and a dissolution and an injunction are sought on that ground (1).

7. A Court of Equity will grant an injunction to restrain a partner, during the partnership term, from carrying on business with other persons in the name of the old firm, and from publishing notices of dissolution (2). So it will grant an injunction to restrain one of two late partners from carrying on the partnership business on his own private account, after a dissolution, and thereby diminishing the value of the partnership property, and from impeding a receiver, and will direct the partner attempting to do so, to account for profits (3). If, upon a bill for a dissolution of a partnership, the Court is not able to say that a dissolution must be declared at the hearing of the cause, it will not appoint a receiver, as the appointment of a receiver operates as an injunction; and the principle on which a Court of Equity acts with regard to the appointment of a receiver in these cases, is this: it will not appoint one on an interlocutory application, unless it sees that there is an actual present dissolution arising from the acts of the parties, or that at the hearing it would, upon the merits, dissolve the partnership. If there be misconduct, a Court of Equity can and will, before the time for the termination of the partnership arrives, appoint a receiver; and it will, though disinclined to such orders, on a proper case being made, do so on an interlocutory application (4).

8. The power and authority of a sole solvent partner, upon the bankruptcy of his co-partner, to get in and sell the partnership assets are vested in him personally for partnership purposes, to enable him to wind up the affairs of the partnership, and cannot be transferred by him to another, either by assignment of "all his share and interest" in the partnership, or by exposing himself,

(1) *Cook v. Catchpole*, 34 L. J. (Ch.) 60; 10 Jur. (N. S.) 1068.

(2) *Englund v. Curling*, 8 Beav. 129.

(3) *Turner v. Major*, 3 Giff 442.

(4) *Baxter v. West*, 28 L. J. (Ch.)

although *bonâ fide*, to a judgment, under which all such share and interest is taken in execution, and it would seem that even the partner himself might in some cases be restrained (1). And a sale of partnership assets by an execution creditor of a solvent partner claiming the sole property is a tortious conversion, and will be restrained (2). So the assignees in bankruptcy of one partner will, at the suit of the solvent partners, be restrained from selling the partnership joint effects (3).

9. A Court of Equity will not restrain a partner who has, six months previous to the application, been temporarily of unsound mind, from interfering with the partnership affairs (4). It seems to be now quite settled law that the actual insanity of a partner is not of itself a dissolution of partnership, but that it is necessary to obtain a decree for a dissolution, and that the dissolution does not take place until the decree has been made; and such a decree, notwithstanding actual insanity proved to have existed before the filing of the bill, will not be made, where there is any dispute on the subject, without an inquiry whether at the time when the relief is sought, the party is in such a state of mind as to be able to conduct the business of the firm in partnership with the other members according to the articles of partnership (5).

10. A Court of Equity will interfere by injunction in cases of partnerships constituted by verbal agreements, and will where necessary, protect the partnership property from being received by the partners, pending the taking of the accounts upon a dissolution of the partnership (6). If a party has been treated by the defendant as a member of a partnership consisting of an association of a great number of persons, he can maintain a suit to preserve and secure the property of the association, and can obtain an injunction to restrain the defendant from selling the partnership property (7).

11. Though the principles of Courts of Equity will not permit

(1) *Fraser v. Kershaw*, 2 K. & J. Ch. 230.

496; 2 Jur. (N. S.) 880; 24 L. J. (4) *Anon.*, 2 K. & J. 441.

(Ch.) 445. (5) *Ib.*

(2) *Ib.* (6) *Peacock v. Peacock*, 16 Ves. 49.

(3) *Allen v. Kilbre*, 4 Madd. 464; (7) *Sheppard v. Oxenford*, 1 K. & J. 491.
vide Francis v. Spittle, 9 L. J. (N. S.)

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that parties bound to each other by express or implied contract to promote an undertaking for the common benefit, should any of them engage in another concern which necessarily would give them a direct interest adverse to that undertaking, yet mere temptation to the abuse of partnership effects in consequence of joining in another concern is not sufficient to induce a Court of Equity to grant an injunction (1).

12. If there are strong grounds for thinking that goods have been purchased with partnership property, or with money for which a defendant, as a partner, is accountable to the partnership, and that the goods belong to the partnership, a Court of Equity will restrain the defendant from receiving goods so purchased (2). A partner in trade has no right to employ the partnership property in a private speculation for his own benefit (3).

13. A Court of Equity will restrain a partner, after the determination of his partnership, from disclosing a secret forming the foundation of the business, communicated to him by another partner, in breach of the latter's partnership agreement (4).

14. A party who has been manager and afterwards a partner in a firm may, upon setting up a separate business, avail himself of the reputation and confidence which he might gain from the world by means of the statement of that fact, but he is not entitled to make that statement or to avail himself of that reputation in a way calculated to represent to the world that the business which he is carrying on is that of the firm, or that a remaining member of the firm has any interest in the business set up by the late partner (5).

15. The Court will not restrain an acting partner from collecting debts, or creating them, unless it be shewn that the partner has been guilty of culpable conduct, or is insolvent (6); nor will the Court, on the application of one partner, restrain another from using the partnership property or name, unless a case of misrepre-

(1) *Glassington v. Thwaites*, 1 S. & S. 124.

(2) *Gardner v. M'Cutcheon*, 4 Beav. 534.

(3) *Ib.*

(4) *Morison v. Moat*, 21 L. J. (N. S.) Ch. 248; 9 Harc. 241.

(5) *Hookham v. Pottage*, 21 W. R. 47; 20 W. R. 720; L. R. 8 Ch. 91, 95; 27 L. T. (N. S.) 595; 26 L. T. (N. S.) 755.

(6) *Lawson v. Morgan*, 1 Price, 303; *et vide Read v. Bowers*, 4 Bro. C. C. 441.

sensation or abuse is made out against him (1). But the Court will restrain a partner from doing an intentional serious injury to the partnership property (2)

16. The Court will restrain a co-partner from interfering in the management of the business, where the effect of suffering him to interfere would be irreparable mischief to the partnership business (3).

17. The Court will restrain a surviving partner from disposing of the joint stock if he is in embarrassed circumstances and spending the joint moneys on himself and family (4).

18. The Court will not restrain the granting of a lease to the personal representatives of a deceased partner who had contracted to take the same in his own name for the partnership trade, but will restrain them from disposing of the lease when granted, except for the benefit of the partnership and for partnership purposes, and with the assent of the surviving partner (5).

19. The Court will, at the suit of a surviving partner, grant an injunction to restrain a sheriff from removing from the partnership premises, selling, or intermeddling with the partnership effects, if the goods of the partnership have been taken in execution for a debt due from the deceased partner, who died before the writ was delivered to the sheriff (6). In such case the property in the goods vested at Law in the plaintiff, the surviving partner, before the writ was delivered to the sheriff (7).

20. Equity will not interfere in favour of a party claiming under a bill of sale by one partner, where the assignee allows the other partner to mingle undistinguishably the other partnership goods with those in the bill of sale (8).

21. A sum borrowed by one partner on his own security does not become a partnership debt by being applied for partnership purposes, with the knowledge of the other partner; and the Court will restrain the proceeding with executions upon the partnership

(1) *Hawkins v. Blachford*, 1 L. J. (Ch.) 142.

(5) *Alder v. Fouracre*, 3 Sw. 489.

(2) *Marshall v. Watson*, 25 Beav. 419.

(6) *Newell v. Townsend*, 6 Sim.

501.

(7) *Ib.*

(3) *Anderson v. Wallace*, 2 Moll. 540.

(8) *Chappel v. Cox*, 18 Ind. 513 (Amr.).

(4) *Hartz v. Schrader*, 18 Ves. 317.

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assets for the private debts of one of several partners, and the execution creditors are only entitled to be paid their debts out of the debtor's share of any surplus that may remain after all the demands on the partnership are satisfied (1).

22. If a partner has excluded his co-partner, a Court of Equity will grant an injunction to restrain him from obstructing or interfering with his co-partner in the exercise and enjoyment of his rights under the partnership articles (2). And the Court will restrain a defendant, who has removed the partnership books from the place of business, from keeping them at any other place (3).

23. A Court of Equity will not interfere where the terms and provisions of the partnership agreement are of a harsh description (4).

24. The Court will not interfere in cases of gross mismanagement and neglect by some of the partners, until the other partners have tried the means of redress and jurisdiction provided by the articles, unless there is a positive necessity (5). If, however, a case of delinquency is clearly made out, the Court will act; but there must be a positive necessity for the interference of the Court (6). However, an agreement to refer disputes to arbitration is generally no objection to a suit in a Court of Equity, yet the nature of the subject, and an anxious provision of the parties for arbitration, will prevent the Court from interfering before the parties have taken that course (7). If the parties provide for themselves a *forum*, and introduce a guard against the *forum* of the country, whether effectually or not, they shew their intention against the interference of any other jurisdiction until they have tried the effect of the special means provided by themselves; and the object of an interlocutory motion for an injunction in such a case would be to obtain something in the nature of judicial relief against the effect of an express contract; in such a case the Court ought to be perfectly sure that the conduct of the defendant has been such as to make such relief proper (8).

(1) *Bevan v. Lewis*, 1 Sim. 376; *et vide* Lindley on Partnership, 584-8, 590.

(2) *Hall v. Hall*, 12 Beav. 414.

(3) *Greatrex v. Greatrex*, 1 De G. & Sm. 692.

(4) *Croft v. Haw*, 5 L. J. (N. S.) Ch. 305.

(5) *Carlen v. Drury*, 1 Ves. & B. 154.

(6) *Ib.*

(7) *Waters v. Taylor*, 15 Ves. 10.

(8) *Ib.*

25. A Court of Equity will entertain a bill to compel partners to act according to the provisions of instruments which they have executed, and, where it interferes for that purpose, will take care that the decree shall not be defeated by anything done in the meantime (1). A party taking the share of a partner in a concern cannot be let loose from the obligations that partner is under to the concern (2).

26. Partnership accounts may be taken in various ways; the distinction is, that in the absence of a special agreement, the accounts must be taken in the usual way; but where a special agreement has been made, it must be abided by, provided the parties have acted on it; if not, the articles are read in a Court of Equity as not containing the clauses on which the parties have not acted (3).

27. Upon the non-performance of an agreement for a partnership entered into in ignorance of facts which would prevent the performance of the contract, a Court of Equity will relieve from the payment of the agreed premium, or an apportioned amount thereof, according to the result of the account (4). A party in such a case not getting what he had bargained for, according to the law of a Court of Equity, may come and ask for relief with respect to the non-performance of the agreement (5).

28. The power of a solvent partner, upon the bankruptcy of his co-partner, to sell the partnership property, is a personal authority, personal in himself in his capacity of partner, which he may exercise in that capacity to enable him to wind up the affairs of the partnership, and to pay the debts thereof, and cannot be assigned over to another as part of "all his right and interest" in the partnership, or by exposing himself, although perfectly *bonâ fide*, to a judgment, and allowing his share to be taken in execution; and a Court of Equity will grant an injunction to restrain a judgment creditor who has purchased all the share, right, and interest of the solvent partner in the goods, and has subsequently

Bankruptcy,
Insolvency.

(1) *Const v. Harris*, T. & R. 496, 470; 1 Wils. 297.

521, 528, 529.

(4) *Mackenna v. Parkes*, 15 W. R.

217.

(2) *Ib.*

(3) *Jackson v. Sedgwick*, 1 Sw. 469,

(5) *Ib.*

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professed to sell the whole as his own property, from delivering possession of the goods to the purchaser (1).

29. The Court will, at the suit of the assignee of a bankrupt, restrain trustees in whom funds are vested from transferring them, if there is a probability that they may be proved to have been the property of the bankrupt (2).

30. Although a bankrupt cannot be joined with his assignees in a bill for specific performance of a contract by the bankrupt before his bankruptcy, nor for discovery (3); yet a bankrupt can be joined with his assignees where there is a charge of a fraudulent bankruptcy, and a case of confederacy to defeat the plaintiff's execution (4).

31. The Court of Chancery has no jurisdiction, *simpliciter*, to restrain the party in whom the property of a bankrupt is vested in bankruptcy (5), from making a dividend of that which is admitted to be the estate of the bankrupt, at the suit of a person claiming as a general creditor, and not claiming any specific portion of that estate as being his property. But if the question is whether any assets, any personal estate, or any other species of property which is in the hands of the assignee, as part of the bankrupt's separate estate, is, in fact, the property of the plaintiff. Courts of Law or Equity will decide the question, because the jurisdiction in bankruptcy has authority to deal only with that which is the bankrupt's estate, but has no power to determine what is the bankrupt's estate. If the question is a legal one, it must be tried at Law; if it be an equitable one, it must be decided in a Court of Equity. But when it is determined what is the property of the bankrupt, the whole administration of it falls under the jurisdiction of the Court in Bankruptcy (6). But if there is an objection

(1) *Fraser v. Kershaw*, 2 K. & J. 496.

(2) *Stead v. Clay*, 4 Russ. 550; 1 Sim. 294.

(3) *Whitworth v. Davis*, 1 V. & B. 545.

(4) *King v. Martin*, 2 Ves. Jun. 641.

(5) Under the "Bankruptcy Act, 1869" (32 & 33 Vict. c. 71) a trustee is substituted for the assignees of former Bankrupt Acts, in whom all the property of the bankrupt vests, see ss. 14, 17.

(6) *Halford v. Gillow*, 13 Sim. 44; correcting *Atkinson v. Plummer*, cited in *Eden, Inj.*, 298; *Yewens v. Robinson*, 11 Sim. 105; *Maguire v. O'Reilly*, 3 J. & Lat. 224; 2 Ir. Eq. 335; *Perry v. Walker*, 1 Y. & Coll. C. C. 672; *Berkeley v. Dicker*, 15 W. R. 899 (see "The Bankruptcy Act, 1869," ss. 13, 65, 72, as to the jurisdiction of the Bankruptcy Courts under that Act).

to a composition which applies only as between the debtor and a particular creditor who is bringing an action, and every material question is being raised by the parties in the action, the Court of Bankruptcy will not restrain the action on the application of the debtor⁽¹⁾; nor will it restrain proceedings in a Court of Equity against a bankrupt or liquidating creditor, where the bankruptcy or liquidation would not be a bar to the claim made in the suit. It is quite clear that the Court of Bankruptcy ought not to restrain any suit or action against a bankrupt, to which the discharge of the bankrupt would not be a defence (2). Whatever questions have been decided in the Court of original jurisdiction which first adjudicated upon a subject, should be considered as well decided by a Court of merely concurrent jurisdiction (3).

32. Although a Court of Equity has jurisdiction, upon equitable grounds, to restrain a party from taking proceedings to make a person a bankrupt (4), still it will not interfere where proceedings are being taken by an alleged creditor, with a view to making an alleged debtor, a bankrupt in default of his satisfying the demand, on the ground merely of an allegation that such proceedings are dictated purely by fraud and malice, and that no debt was in fact due (5).

33. The administration of trusts of a creditors' deed, valid and binding under the Bankruptcy Act 1861, s. 192, belongs exclusively to the Court of Bankruptcy; and the Court of Chancery will not, in ordinary circumstances, entertain a suit for the administration of the trusts of such a deed (6). In such cases, the general rule is, to leave such questions to the Court of Bankruptcy where it has sufficient powers to enable it to deal with them (7). However, the jurisdiction of the Court of Chancery in the administration of creditors' deeds is not excluded by the Bankruptcy Act, 1861; but

(1) *Ex parte Watson, In re Watson*, L. R. 2 Ch. D. 63; 24 W. R. 592; 34 L. T. 779.

(2) *Ex parte Coker, Re Blake*, L. R. 10 Ch. 652; 44 L. J. (Bkcy.), 126; *et vide Ex parte Harold, Re Meade*, 24 W. R. 903; 45 L. J. (Bkcy.) 121; 34 L. T. 663; *Ex parte Smith, Re Collie*, 24 W. R. 310; 45 L. J. (Bkcy.) 116.

(3) *Thompson v. Derham*, 1 Hare, 358.

(4) *Attwood v. Banks*, 2 Beav. 192.

(5) *Pim v. Wilson*, 2 Ph. 653.

(6) *Bell v. Bird*, L. R. 6 Eq. 635; 16 W. R. 1165.

(7) *Martin v. Powning*, L. R. 4 Ch. 356; 38 L. J. (Ch.) 212; 20 L. T. (N. S.) 133; 17 W. R. 386; *et vide Phillips v. Furber*, L. R. 5 Ch. 746; 18 W. R. 985; 22 L. T. (N. S.) 707.

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the Court will not exercise its jurisdiction except in cases where the Court of Bankruptcy is unable to give adequate relief (1). If there is a doubt whether a particular deed is void as a composition deed, but it is still sufficient to enable persons claiming under it, to come to a Court of Equity, and all that is required can be conveniently effected under directions given in the Court of Equity, the jurisdiction of a Court of Equity is not ousted, and it will not stay proceedings in an action in a Court of Equity to have the property realized, with a view to the payment of the balance of a debt still due (2). The Court of Chancery has jurisdiction to appoint a receiver, where it is necessary, to prevent irreparable mischief from breach of covenant, although the property may have to be distributed in Bankruptcy, and though the Court of Bankruptcy may be able to give the same relief (3).

34. Although, where a trust has been created for an illegal purpose, a Court of Equity will not in general interfere, it will do so where the illegal purpose fails to take effect; thus an assignee of leaseholds, holding under an assignment made with the view of defeating creditors, will be directed to re-assign the property to the assignor, claiming under an arrangement under the Bankruptcy Act, 1861, s. 110, by which his property has been re-vested in him (4). A Court of Equity will restrain the alienation of property conveyed by a deed which is fraudulent as against the creditors in bankruptcy of the alienor (5).

35. Equity will relieve against a judgment which has been discharged by proceedings in bankruptcy (6). So a suit will be restrained on a claim which has been expunged in bankruptcy (7).

(1) *Stone v. Thomas*, L. R. 5 Ch. 475; 39 L. J. (Ch.) 304; 22 L. T. 219; 39 L. J. (Ch.) 168; 18 W. R. (N. S.) 462.
(2) *Jenney v. Bell*, L. R. 2 Ch. D. 335; 22 L. T. (N. S.) 359.

(3) *Jenney v. Bell*, L. R. 2 Ch. D. 335; 22 L. T. (N. S.) 359; 45 L. J. (Ch.) 369; 34 L. T. 485; 24 W. R. 550.

(4) *Riches v. Owen*, L. R. 3 Ch. 820; 16 W. R. 1072.

(5) *Symes v. Hughes*, L. R. 9 Eq. 166.
(6) *Peatross v. McLaughlin*, 6 Gratt. 64 (Amr.).

(7) *Pease v. Bennett*, 17 N. H. 124 (Amr.).

SECT. 5. *Bills of Sale, Sales, Alienations, Mortgages—Judgments, Charge, Executions—Liens, Charges—Stoppage in Transitu.*

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1. If there is no trust, and the plaintiff has his remedy at Law, a Court of Equity will not interfere to restrain a sale of goods—for instance, to restrain a sheriff from selling goods of the plaintiff on the lands of an execution debtor (1).

Bills of sale,
Sales,
Alienations,
Mortgages.

2. At Law, non-existing property to be acquired at a future time, is not assignable; in Equity, it is so. At Law, although a power is given in a deed of assignment to take possession of after-acquired property, no interest is transferred, even as between the parties themselves, unless possession is actually taken; in Equity, the moment the property comes into existence, the agreement operates upon it, and the beneficial interest in the property is transferred, as soon as it is acquired, to a vendee or mortgagee, who may have an injunction to restrain its removal (2). There is no exclusive right in a subject—for instance, a secret medicine—not protected by patent, to prevent a sale by another person under the same title, that other person not assuming the name and character of the plaintiff (3). If the defendant merely represents that he sells, not the plaintiff's article, but one of as good a quality, he is at perfect liberty to do so (4).

3. If the treasurer of a corporation is one of the mortgagees of the capital stock of the corporation, a Court of Equity will restrain a sale under a power in the mortgage, until the treasurer shall have furnished to the mortgagor any information relative to the condition of the corporation, and affecting the value of the stock, which the treasurer may have obtained by virtue of his office, beyond what appears from the books of the corporation (5).

4. The mortgagee of business premises who is in possession, has a right to carry on the business—not indefinitely, but for a reasonable time—if his object is to reimburse himself by dis-

(1) *Jackson v. Stanhope*, 15 L. J. 218; see *Morison v. Moat*, 9 Hare, 241; and see the "Exhibition Medals Act," 1862 (26 & 27 Vict. c. 119).

(2) *Holroyd v. Marshall*, 10 H. L. C. 191; 9 Jur. (N. S.) 213; 11 W. R. 171; 9 W. R. 303. (4) *Canham v. Jones*, 2 V. & B. 221.

(5) *Frieze v. Chapin*, 2 R. I. 429 (Amr.).

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Judgments,
Charge,
Executions.

posing of the business as a going concern, and the Court will not restrain him from so doing (1).

5. A judgment creditor cannot obtain a charge on an equitable debt, by analogy to attachment of a legal debt under the garnishee clauses of the Common Law Procedure Act, 1854 (2).

6. There can be no execution against goods in the hands of a trustee, and the Court will restrain a judgment creditor of a *cestui que trust* from enforcing his judgment against such goods (3). It is held, in general, that the jurisdiction of Equity to enjoin a sale of real estate is co-extensive with its jurisdiction to set aside a deed of the property, and order it to be cancelled (4). So that, if a valid judgment at Law be iniquitously used, Equity will annul what has been improperly done under it (5). So Chancery will grant an injunction to prevent a party from making use of a legal writ of execution for the purpose of vexation and injustice (6); or to restrain the sale of property illegally taken in execution (7). An execution sale may be enjoined, where it would cause a cloud on the title of the complainant (8).

Liens,
Charges.

7. A Court of Equity will, by means of an injunction, enforce liens on the proceeds of a cargo; and the consignee of a cargo, by agreement with the owner chartering a ship, and expending the money necessary and proper in order to enable her to fetch the cargo, is, without any special agreement to that effect, entitled to a lien on the proceeds of such cargo in his hands for the advance so made; and a person who is not the consignee has, under such circumstances, a similar lien on the proceeds of the cargo, if he can arrest such proceeds before they come to the hands of the skipper of the cargo (9). So the Court will enforce a lien for moneys advanced to complete a ship, and will restrain the selling

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| (1) <i>Cook v. Thomas</i> , 24 W. R. 427. | (5) <i>Bissell v. Bozman</i> , 2 Dev. Ch. 160 (Amr.). |
| (2) <i>Horsley v. Cox</i> , L. R. 4 Ch. 92; 38 L. J. (Ch.) 285; 20 L. T. (N. S.) 128; 17 W. R. 596. | (6) <i>Colt v. Cornwell</i> , 2 Root, 108 (Amr.). |
| (3) <i>Cailland v. Estwick</i> , 2 Anstr. 381. | (7) <i>Kenyon v. Clarke</i> , 2 R. I. 6 (Amr.). |
| (4) <i>Pixley v. Huggins</i> , 15 Cal. 127 (Amr.). | (8) <i>Key, &c. v. Munsell</i> , 19 Iowa 305 (Amr.). |
| (9) <i>Young v. Neill</i> , 32 Beav. 529; 9 Jur. (N. S.) 967. | |

mortgaging, or otherwise dealing with the ship so as to prejudice the lien (1).

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8. There is a lien upon a brewers' lease for moneys advanced to complete the purchase, created by deposit of the deed with the brewers simultaneously with the creation of the lease, and a Court of Equity will restrain an action by the assignees in bankruptcy of the borrower, brought by them against the brewers, to recover a part of the purchase-money of the lease (2).

9. An agent carrying on, in his own name, the business of his principal, has a lien on the property of the concern to the extent of his liabilities for the concern; and the Court will restrain the assignees in bankruptcy of the principal from taking possession of or selling the business, or premises, or stock, and from collecting moneys due to, or in any way intermeddling or interfering with the concern (3).

10. A Court of Equity will restrain garnishees from paying a fund which has been attached under the 17 & 18 Vict. c. 26, s. 61, to the judgment creditor, until a solicitor's lien thereon for costs is satisfied (4). The Court will restrain an action by the assignees in bankruptcy of a country solicitor, against the client, for the bill due to the country solicitor; if the client has paid the agent his bill, in order to obtain the papers in the agent's hands, the agent has a lien upon the papers for his own costs; and if the client discharge the agent's bill, he is entitled to stand in the agent's place (5).

11. An agreement that a judgment debt, and interest thereon, shall be paid to the judgment creditor out of any moneys which may be recovered by the judgment debtor in respect of certain claims by him against third parties, creates a valid equitable charge upon these moneys when recovered; and the Court will restrain the judgment debtor from receiving the moneys paid into a Court of Law, until the judgment debt and interest are paid (6).

(1) *Swainston v. Clay*, 11 W. R. 811; 3 De G. J. & S. 558; 32 L. J. (Ch.) 503; 8 L. T. (N. S.) 563.

(2) *Meux v. Smith*, 1 M. D. & De G. 396; 2 M. D. & De G. 315, 789; 11 Sim. 410.

(3) *Poxcroft v. Wood*, 4 Russ. 487.

(4) *Sympson v. Prothero*, 3 Jur. (N. S.) 711; 26 L. J. (Ch.) 671.

(5) *Bray v. Hine*, 6 Price, 203 (*et vide* Beames on Costs in Equity, p. 214, 2nd Ed.).

(6) *Riccard v. Prichard*, 1 K. & J. 277.

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Stoppage *in transitu*.

12. A bill in Equity will lie to enforce a right of stoppage *in transitu*, and that right is a proper subject for a bill in Equity (1). And the Court will restrain the sale of goods where the *transitus* is not over (2). The *transitus* of goods is not ended by delivery on board a ship chartered by the vendee; but the right of stoppage *in transitu* extends only over the goods themselves, and it also entitles the vendor to the net proceeds of the sale thereof (3). The question in deciding upon a consignor's right of stoppage *in transitu* is, not whether the voyage is at an end, but whether the goods are at home, actually or constructively in the possession of the vendee (4).

SECT. 6. *Grants—Settlements.*

Grants.

1. Whether a conveyance of land for the purpose of a railway being constructed thereon, be voluntary or compulsory, every grant carries with it, in addition to any special protection afforded by the Railway Act, all that is necessary to the enjoyment of the subject-matter of it; and a certain amount of lateral support being essential to the safety of the railway, that is a necessary incident of the grant. But the amount of support depends on the special circumstances of the locality (5). If it be impracticable to define beforehand the limits within which workings dangerous to the stability of the subject-matter of the grant ought to be restrained, an injunction is properly expressed in general terms against working so as to produce the particular evil apprehended (6). So, on the other hand, at Common Law, if a person has two interests in the same hereditament and demises one part, reserving to himself the other, the grantee, either for years or in fee, will not, except by express stipulation or very direct impli-

(1) *Schotmans v. Lancashire and Yorkshire Railw. Co.*, L. R. 2 Ch. 332; L. R. 1 Eq. 349; 14 W. R. 270; 12 Jur. (N. S.) 42.

(2) *Fraser v. Witt*, L. R. 7 Eq. 64; 17 W. R. 92; 19 L. T. (N. S.) 440.

(3) *Berndtson v. Strang*, 27 L. J. (Ch.) 665; L. R. 3 Ch. 588; 16 W. R. 1025; 19 L. T. (N. S.) 40; L. R. 4 Eq. 481.

(4) *Coventry v. Gladstone*, L. R. 6 Eq. 44; 37 L. J. (Ch.) 492; 16 W. R. 837.

(5) *Elliott v. North Eastern Railw. Co.*, 1 J. & H. 145; 29 L. J. (Ch.) 808; 2 De G. F. & J. 423; 30 L. J. (Ch.) 160; 8 L. T. (N. S.) 337; 32 L. J. (Ch.) 402.

(6) *Ib.*

ation, be permitted to use the portion held by him, so as to interfere with the enjoyment by the grantor of the portion of which he has retained possession (1).

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2. A Court of Equity will direct trustees of funds in settlement to deal with them according to the trusts of the settlement, notwithstanding a notice not to do so, unless proceedings are taken upon the notice (2). If a settlement, though for good consideration, is voluntary, as between the persons claiming under it and a purchaser for valuable consideration, though with notice, the purchaser will hold the estate; such a settlement is void under the 27 Eliz. c. 4, against such a subsequent purchaser, though a fair provision for a wife and children, and the Court will not restrain the husband from selling (3). But the *cestuis que trust* are entitled, until an actual sale, to an execution of the trusts (4). But when a voluntary settlement of lands is avoided by a subsequent sale for valuable consideration, the volunteers have no equity against the purchase-money payable to the settlor (5). A Court of Equity will, upon sufficient evidence of the trusts, establish a settlement destroyed by fraud, and will restrain an intended sale of the property by the party committing the fraud, and direct the trusts of the settlement to be carried into effect (6). The Court will grant an injunction against proceedings at Law by a covenantor to enforce a covenant for charging a sum of money upon lands, by way of a portion for a daughter of the covenantor, upon the covenantor offering to execute any instrument which should be deemed necessary for charging the same (7).

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SECT. 7. *Pensions.*

1. An assignment for valuable consideration by a retired military officer of his pension for past services, is void under the 47 Geo. 3, sess. 2, c. 25, s. 4; and a Court of Equity will not

(1) *Dugdale v. Robertson*, 3 K. & J. 695; 3 Jur. (N. S.) 687.

(4) lb.

(2) *Lonergan v. Stourton*, 9 Jur. (N. S.) 1067; 11 W. R. 984; 9 L. T. (N. S.) 196.

(5) *Dakin v. Whimper*, 26 Beav. 568.

(6) *Brandon v. Barlow*, 13 L. T. (N. S.) 6.

(3) *Pulvertoft v. Pulvertoft*, 18 Ves. 84, 90.

(7) *Whaley v. Morgan*, 2 D. & Wal. 330.

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restrain the officer from applying for or receiving the pension (1). But a retired officer in the army will be restrained from intercepting the receipt of a pension for wounds, &c., granted "until further order," which he has assigned as security for the payment of a redeemable annuity (2). But pensions granted by the Government of India to military persons employed in India for the purpose of the Indian government, may be assigned as security for a debt, as such pensions are not within 46 Geo. 3, c. 69; and 47 Geo. 3, sess. 2, c. 25 (3). And an East India Company's pension, payable by the Secretary of State for India, is assignable by way of mortgage, and in the event of a foreclosure of the mortgage becoming absolute, the Court will direct the mortgagor to execute a power of attorney enabling the mortgagee to receive the pension (4). So independently of the 47 Geo. 3, sess. 2, c. 25, a pension for past services may be aliened, but a pension for supporting the grantee in the performance of future duties is inalienable (5).

2. A retired storekeeper of one of Her Majesty's dockyards will be restrained from receiving the balance of his pension after a provision for his creditors in insolvency, where he has assigned the pension to secure a loan; he cannot be allowed to violate the contract made by him with the assignees (6). And it would seem that compensation allowance for the loss of an office in the Customs, though revocable at the pleasure of the Government, is assignable (7). If the duties of an office are not connected with the public service, as, for instance, those of a canonry of Windsor, the payment of the income of the canonry may be restrained in favour of a grantee of the profits as a security for a sum of money (8). But there are various cases in which public duties are concerned, in which it might be against public policy that the income arising from the performance of those duties should be assigned; and for this simple reason, because the public is interested, not only in the

(1) *Lloyd v. Cheetham*, 3 Giff. 171; 9 W. R. 924.

(2) *Knight v. Bulkeley*, 5 Jur. (N. S.) 817; 4 Jur. (N. S.) 527; 27 L. J. (Ch.) 592.

(3) *Carew v. Cooper*, 4 Giff. 619.

(4) *James v. Ellis*, 19 W. R. 319; 24 L. T. (N. S.) 12.

(5) *Davis v. Duke of Marlborough*, 1 Sw. 79.

(6) *Lloyd v. Eagle*, 5 Jur. (N. S.) 187; 28 L. J. (Ch.) 389.

(7) *Tunstall v. Boothby*, 10 Sim. 542; 9 L. J. Ch. (N. S.) 294.

(8) *Grenfell v. The Dean and Canons of Windsor*, 2 Beav. 544.

performance from time to time of the duties, but also in the fit state of preparation of the party having to perform them; such is the reason in the cases of half-pay, where there is a sort of retainer, and where the payments which are made to officers from time to time are the means by which they, being liable to be called into public service, are enabled to keep themselves in a state of preparation for performing their duties; if, therefore, they were permitted to deprive themselves of their half-pay, they might be rendered unable promptly to enter upon their duties when called upon, and the public service would be thereby greatly injured (1). So, also, where a pension or remuneration is given for a purpose which tends less directly to the public benefit, as, for instance, in the case of the pension given to the Duke of Marlborough as a memento of the gratitude of the nation, and as a reward for his distinguished public services; it was there the intention of the Legislature that it should be kept in mind, that it was given for those great services; in that case the pension was held inalienable, because it was considered that one of the objects of giving the pension, namely, for having a perpetual memorial of national gratitude for public services, would be entirely lost (2). The pension of a great public officer cannot be aliened, because that public officer must not be allowed to fall into such a situation as to make it difficult for him, in consequence of any pecuniary embarrassment, to maintain the dignity of his office (3). But if it is a service to be performed for the benefit of the party himself, the profits of the office are a valid security (4).

SECT. 8. *Penalties, Conditions.*

1. If the rights of a third party are involved, a Court of Equity will treat a condition attaching in default of payment of a sum of money as a penalty, and will relieve against the penalty being

(1) *Grenfell v. The Dean and Canons of Windsor*, 2 Beav. 544.

(3) *Davis v. The Duke of Marlborough*, ante.

(2) *Grenfell v. The Dean and Canons of Windsor*, ante; *Davis v. The Duke of Marlborough*, 1 Sw. 74.

(4) *Grenfell v. The Dean and Canons of Windsor*, 2 Beav. 544.

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enforced (1). A proviso in a mortgage for the payment of a larger sum for interest, if the smaller sum for interest is not paid within a certain time, is in the nature of a penalty, and will be relieved against (2); but it is otherwise, if a larger sum for interest is reserved originally, to be reduced to a smaller sum for interest, if paid within a certain time (3). But the reservation of a right to have full payment of money actually due on an existing contract, should there be a failure to pay a smaller sum on a day certain, will not be treated as a penalty, nor is it a penalty or forfeiture, or anything of the kind, but simply a provision that, upon the terms upon which the indulgence is granted not being complied with, the original rights shall be preserved, and that the creditor shall be entitled to avail himself of those rights; and such a remitter to his original rights does not constitute a penalty, and Equity will not interfere to prevent its observance (4).

2. A Court of Equity will not allow a covenant which is in effect a penalty, and not in the nature of liquidated damages, to be violated (5). Equity will relieve against a penalty for not performing an unreasonable contract (6). If a proviso is binding and plainly intended to be part of a security for the debt, and in no way in the nature of a penalty, a Court of Equity will refuse an injunction to restrain an action brought for the amount due (7).

3. Equity will, in many cases, carry on the debt beyond the penalty of the security, as where a man is kept out of his money by an injunction, or is prevented from going on at Law (8). So, where an advantage is made of money, interest shall be carried beyond the penalty (9). So, where a bond is only taken as a collateral security (10); or where the recovery of the debt is

(1) *Carrol v. O'Connor*, 11 Ir. Eq. Rep. 200.

(2) *Strode v. Parker*, 2 Vern. 316, 2nd Ed.

(3) *Strode v. Parker*, *supra*; *Holles v. Wyse*, 2 Vern. 289; *et vide Nicholls v. Maynard*, 3 Atk. 519; *Bonafons v. Rybot*, 3 Burr. 1374.

(4) *Thompson v. Hudson*, L. R. 4 H. L. 1, 15; 38 L. J. (Ch.) 431; L. R. 2 Eq. 612; L. R. 2 Ch. 255.

(5) *Carden v. Butler*, Hay & J. 112.

(6) *Thompson v. Harcourt*, 1 Bro. P. C. 193.

(7) *Sterne v. Beck*, 1 De G. J. & S. 595; 32 L. J. (Ch.) 682; 11 W. R. 587; 8 L. T. (N. S.) 344.

(8) *Duval v. Terry*, Show. P. C. 15; *Hale v. Thomas*, 1 Vern. 350, 2nd Ed.; 2 Ch. Ca. 182, 186.

(9) *Dunsany (Lord) v. Plunkett*, 2 Bro. P. C. 251.

(10) *Kirwane v. Blake*, 2 Bro. P. C. 333.

delayed by the obligor (1); or the creditor—obligee in a bond—has been restrained by an injunction obtained by the debtor, from proceeding at Law, and there has been no misconduct on the part of the creditor (2).

4. Penalties and forfeitures must, as a general rule, be waived by a party seeking equitable relief (3).

SECT. 9. *Powers.*

1. A party may deprive himself of the right of executing a power, for instance, if a tenant for life in lands, who has obtained an injunction to restrain proceedings at Law to recover moneys secured on bonds, enter into a consent in the cause with his creditors, by which it is agreed that a certain sum shall be found due on the foot of the bonds, and a decree is pronounced declaring that this sum is due and well charged on the lands; the consent thus acted on and embodied in the decree, is such an act of contract on the part of the debtor as will deprive him of the right of executing a power to charge his life estate with portions for younger children, so as to affect the rights of the creditors under the decree which had attached upon his life estate (4).

2. A Court of Equity will, in favour of persons standing in the situation of purchasers for value, supply a defect in the execution of a power, which consists in the want of some circumstance required in the manner of the execution, as the want of a seal, or of a sufficient number of witnesses, or where it has been exercised by a deed instead of a will; but will not do so on the ground of the non-execution of a power, nor will it grant an injunction to restrain proceedings at Law instituted on that ground (5).

(1) *Pulteney v. Warren*, 6 Ves. Jun. 92; *et vide Clarke v. Seton*, Ib. 411.

(4) *Piers v. Tinte*, 1 D. & Wal. 279.

(2) *Grant v. Grant*, 3 Russ. 598.

(5) *Cockerel v. Cholmeley*, 3 Russ.

(3) *Colburn v. Simms*, 2 Hare, 554; *Mason v. Murray*, cited 3 Bro. C. C.

565; 1 Russ. & My. 418; Taml. 435; 1 Cl. & F. 60; 6 Bligh, 120.

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SECT. 10. *Charities.*

1. Nothing is better established than that the Court of Chancery does not entertain a general jurisdiction, or regulate or control charities established by charter, unless the governors have also the management of the revenues; in that case the Court does assume a jurisdiction of necessity, so far as they are considered trustees of the revenue, and abuse their trust (1). A Court of Equity will decide of what denomination of religion an endowed school is, and of what church the trustees and master ought to be members, and to what religious denomination of scholars the instruction is open (2). But though it may hold that a trustee was originally improperly appointed, it may still decline to remove him, there being a great difference between appointing trustees in the first instance and removing them when once appointed (3). If the revenues of a charity grammar-school have increased largely, it will restrain the appointment of a new master until something has been settled as to a new scheme (4). The Court will restrain the exercise arbitrarily of a power and trust to remove a master (5). The master of a free grammar-school has an estate of freehold in his office, and is not removable at the pleasure of the patrons of the school, and the Court will restrain an ejectment brought by the patrons to evict the master from the possession of the school-house (6). But under the Public Schools Act, 1868 (31 & 32 Vict. c. 118, ss. 13, 28), the head masters of all the great public schools to which that Act applies are subject to the control of the governing body of each school, and they hold their office at the pleasure merely of the new governing bodies, and are liable to be dismissed without notice and without any reason being assigned. And all arbitrary powers, such as that

(1) *Att.-Gen. v. Governors of The Foundling Hospital*, 2 Ves. Jun. 42.

(2) *Att.-Gen. v. Clifton*, 32 Beav. 596; 9 Jur. (N. S.) 939; 9 L. T. (N. S.) 136.

(3) *Ib.*

(4) *Att.-Gen. v. Warden, &c. of Louth Free School*, 14 Beav. 201.

(5) *Willis v. Childe*, 13 Beav. 117.

(6) *Chipping Sodbury (Grammar School of)*, 8 L. J. (Ch.) 13. See now as to the removal of schoolmasters or mistresses or any other officer of a charity, "The Charitable Trusts Act, 1853" (16 & 17 Vict. c. 137, s. 22); "The Charitable Trusts Act, 1860" (23 & 24 Vict. c. 136, s. 14).

of dismissal, may be exercised without assigning any reason, provided they are fairly and honestly exercised, which they will always be presumed to have been until the contrary is shewn (1).

2. If the master of a grammar-school is only an officer of a foundation, and not a *cestui que trust*, in the sense in which the word "trust" is used in a Court of Equity in the ordinary case of trustee and *cestui que trust*, of the stipend and emoluments of the office, such a Court has no jurisdiction to interfere to prevent the removal of the master from his office, nor to do so *pendente lite*, nor to prevent the appointment of another one in his stead, unless a special case for that purpose is made by the proceedings (2).

3. A Court of Equity will decide whether or not an election of an object for a charity shall or not be set aside, where there is a charge that the election has been obtained by colourable means, and not *bonâ fide* (3).

4. Agreements between a master of a free grammar-school and the patrons as to the mode of conducting the school, which have a tendency to alter its character, are invalid, and do not bind the master; and the patrons are guilty of a breach of duty when they require or induce a master, or a candidate for the office of master, to enter into such agreements (4).

5. A Court of Equity has jurisdiction over ecclesiastical property when affected by a trust (5). Such a Court, in the absence of information as to the exact meaning to be attributed to the words in the trust deed, or deed of endowment of a church, by which the specific purposes of the trust are professed to be

(1) *Hayman v. Governors of Rugby School*, L. R. 18 Eq. 28, 68; 43 L. J. (Ch.) 834; 22 W. R. 587; 30 L. T. (N. S.) 217.

(2) *Whiston v. Dean and Chapter of Rochester*, 7 Hare, 532; 18 L. J. (N. S.) Ch. 473.

(3) *Etherington v. Wilson*, 24 W. R. 303; 45 L. J. (Ch.) 153; 33 L. T. (N. S.) 652.

(4) *Chipping Sodbury (Free Grammar School of)*, 8 L. J. (Ch.) 13. See further as to the statutory law of en-

dowed schools, "The Endowed Schools Act, 1860" (23 Vict. c. 11), "The Endowed Schools Act, 1868" (31 & 32 Vict. c. 32), "The Endowed Schools Act, 1869" (32 & 33 Vict. c. 56), "The Endowed Schools Act, 1873" (36 & 37 Vict. c. 87), "The Endowed Schools Act, 1874" (37 & 38 Vict. c. 87).

(5) *Att.-Gen. v. St. John's Hospital, Bedford*, 2 De G. J. & S. 621; 11 Jur. (N. S.) 629.

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indicated, will not put a construction on them, but will restrain the trustees from using the church for any other purposes than those specified in the deed itself, and in the words of that deed (1). But the Court will direct a chapel, in which it is shewn that the nature of the religious service has been changed from that of its original foundation, to be restored to those professing the original doctrines of the deed of endowment, and will remove the trustees who have concurred in this change and appoint new ones (2).

6. A Court of Equity will not assist the trustees of a chapel who have dismissed the minister under proceedings which, from not being taken in accordance with the deed of settlement, are invalid—by restraining the minister from acting as minister of the chapel (3). But if a minister of a dissenting chapel has been duly dismissed, he will be restrained from officiating in the chapel (4).

SECT. 11. *Wills, Probates, Letters of Administration.*

1. Where parties are dissatisfied with a probate, a Court of Equity will suspend its determination till after a trial upon its validity, in the proper Court; and though neither a Court of Equity nor a Court of Law can determine the validity of a probate in an “adversary” way, yet if it come before the Court on an incident in the cause, and that incident is admitted by the parties, a Court of Equity or a Court of Law may determine it, and hold the parties bound by their admission; and if either of the parties were to bring a new suit to contest that determination, a Court of Equity would certainly grant a perpetual injunction (5). Although the jurisdiction of Courts of Equity, pending

(1) *Att.-Gen. v. Munro*, 9 Jur. 461.

(2) *Att.-Gen. v. Aust*, 13 L. T. (N. S.) 235.

(3) *Dean v. Bennett*, L. R. 6 Ch. 489; L. R. 9 Eq. 625; 22 L. T. (N. S.) 368; 24 L. T. (N. S.) 169; 39 L. J. (Ch.) 674; 40 L. J. (Ch.) 452; 18 W. R. 487; 19 W. R. 363.

(4) *Cooper v. Gordon*, 17 Jur. 908; 20 L. T. (N. S.) 732; L. R. 8 Eq. 249; 38 L. J. (Ch.) 489. See further as to

the statutory law of charities, “The Charitable Trusts Act, 1853” (16 & 17 Vict. c. 137), “The Charitable Trusts Amendment Act, 1855” (18 & 19 Vict. c. 124), “The Charitable Trusts Act, 1860” (23 & 24 Vict. c. 136), “The Charitable Trusts Act, 1869” (32 & 33 Vict. c. 110).

(5) *Sheffield (Duchess of) v. Duke of Buckinghamshire*, 1 Atk. 630.

a disputed administration in the Ecclesiastical Court, to protect the property by a receiver, was not ousted by the power of the latter Court to appoint an administrator *pendente lite*, and Courts of Equity had power to restrain a party, pending a suit in the Ecclesiastical Court to recall letters of administration, from intermeddling with the personal estate (1); yet since the Probate Act of 1857 (20 & 21 Vict. c. 77), ss. 70, 71, the Court of Chancery will not appoint a receiver where the Court of Probate has appointed an administrator *pendente lite*, that Act having extended the powers of such an administrator appointed by the Court of Probate, and such an administrator has the same power of protecting the property as a receiver appointed by the Court of Chancery (2). The question in such a case is not whether the Court of Chancery has now jurisdiction, but whether having jurisdiction, it will exercise it by appointing a receiver to do that which the administrator appointed by the Probate Court can do without the intervention of that Court (3). And the Probate Division of the High Court of Justice will now, in a case of danger, restrain a bank from parting with the assets of the testator to the executor, where there is an action for revocation of the probate, and there is no administrator *pendente lite* (4).

2. A Court of Equity will stay execution upon an ejectment obtained against the heir, upon a devise of an estate of a lunatic, obtained by a trustee of the lunatic for his own benefit (5).

3. Although a Court of Equity has no jurisdiction to try the validity of wills, either of real or personal estate (6), yet if the probate of a will has been fraudulently obtained, the Court will relieve against the probate (7). And so it will relieve against letters of administration obtained by fraud (8).

(1) *Ball v. Oliver*, 2 V. & B. 96; *et vide Atkinson v. Henshaw*, 2 V. & B. 85; *Dimes v. Steinberg*, 2 Sm. & Giff. 75.

(2) *Veret v. Duprez*, L. R. 6 Eq. 329.

(3) *Ib.*

(4) *Melhuish v. Milton*, 24 W. R. 679 (see the Judicature Act, 1875, Ord. 52, r. 3).

(5) *Murley v. Greenham*, 9 Jur. 576.

(6) *Jones v. Frost*, Jac. 466; 3 Madd. 1; *et vide Jones v. Jones*, 3 Mer. 161; 7 Price, 663.

(7) *Barnesley v. Powell*, 1 Ves. Sen. 119, 287; *vide Gingell v. Horne*, 9 Sim. 539.

(8) *Gibson v. Head*, 17 W. R. 986.

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SECT. 12. *Gambling, Gaming.*

1. A Court of Equity will decree to be delivered up, securities which have been given by a plaintiff to prevent a threatened prosecution for cheating at cards to obtain the penalties for that offence under the 9 Anne, c. 14, s. 5. If the defendant can recover the penalties at Law, he is at liberty to do so, but he will not be allowed to be an arbitrator in his own cause, and determine the amount of the penalty the plaintiff ought to pay for his the defendant's benefit (1).

2. Bills of exchange made in France, substituted for English bills of exchange originally given for a gambling debt, will be ordered to be delivered up (2). Equity will restrain an innocent *banâ fide* assignee for value of a security given for money won in gaming, from enforcing his claim, even upon a judgment already obtained, and although the defendant at Law has not resisted the suit at Law on that ground (3). But if a judgment creditor,—assignee of a debt for money won at cards,—took the debt under a false representation or concealment of the debtor, as to the consideration, a Court of Equity will not relieve against the judgment (4).

3. A Court of Equity will not interfere to relieve in respect of a speculative transaction upon the Stock Exchange, where the claim to relief amounts in effect to this, that the plaintiff has been misled, by the trick of some fellow speculators, to enter into a transaction which has not turned out so profitably as he expected. Such a case stands on the same footing as a mere gambling or betting transaction, with which the Court declines to interfere (5).

(1) *Osbaldiston v. Simpson*, 13 Sim. (Amr.).
513.

(2) *Wynne v. Callander*, 1 Russ. 354 (Amr.).

293. (5) *Rees v. Fernie*, 13 W. R. 6.

(3) *Gough v. Pratt*, 9 Md. 526

SECT. 13. *Arbitrations, Awards.*PART II.
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1. There is no original jurisdiction in the Court of Chancery, in the nature of a writ of prohibition, to restrain an arbitrator from proceeding to make an award; the only jurisdiction that exists to stop the proceedings is founded on the conduct of the parties (1). It has jurisdiction to restrain an arbitrator from proceeding under a reference, on the ground of corruption (2).

2. An award may be good in Equity, though the authority to make it was revoked before the award was made (3).

3. Where a submission does not contain an express agreement enabling the parties to make it a rule of Court, and it has not been made a rule of Court, neither the submission nor the award is brought within all the consequences or provisions of the 9 & 10 Will. 3, c. 15, by force of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 17, and the jurisdiction of a Court of Equity to set aside the award has not been taken away, but this jurisdiction will not be exercised without great caution; and, unless gross hardship and injustice would result from a refusal to interfere, the Court will not—unless in a strong case, and particularly if the Court is disposed to the view that the arbitrators had, however irregularly, come to a correct conclusion—assist a party who might have obtained relief by taking proper steps at Common Law, in an action upon an award, by making the submission a rule of Court, but allowed the opportunity for doing so to lapse; and in such a case, the Court of Chancery will follow the course taken by the Courts of Common Law, and adopt a rule of its own in analogy to the limitations of the statute (4). In such a case the plaintiff must, by his course of conduct, be taken to have elected to defend himself against the award by defending the action, and to abandon all other modes of opposition, and must therefore abide by the result of the action (5). If in pursuance of one of the terms of an agreement to refer disputes to arbitration, the submission (not being a submission in a cause

(1) *Pickering v. Cape Town Railw.* & W. 505.
Co., L. R. 1 Eq. 84.

(2) *Malmesbury Railw. Co. v. Budd*, 576; 12 W. R. 244; 10 Jur. (N. S.) 45 L. J. (Ch.) 271.

(3) *Harcourt v. Ramsbottom*, 3 Jac. (5) Ib.

(4) *Smith v. Whitmore*, 1 H. & M. 576; 12 W. R. 244; 10 Jur. (N. S.) 1190.

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depending either in the Court of Chancery or in a Court of Common Law) has been made a rule of a Court of Law, the Court of Chancery has no jurisdiction to relieve against the award. Under the 9 & 10 Will. 3, c. 15, it is intended to give that Court only in which the submission is made a rule, the power of reviewing the award (1). If by consent, an order has been made in Chancery to refer a suit to arbitration, no other Court has jurisdiction over an award made in pursuance thereof (2). And if an agreement of reference has been made a rule of the Court of Chancery in a cause, that Court has jurisdiction to decide whether the award is bad, and to set it aside (3). And although it is true that the Court leans in favour of awards, and will readily adopt a reasonable construction for the purpose of maintaining their validity, yet it will set aside an award if the arbitrators awarded on a matter not referred to them, and what they awarded without authority cannot be separated from the other parts of the award, or if they declined to arbitrate upon certain matters included in the reference (4). The Court has, under the Common Law Procedure Act (17 & 18 Vict. c. 125), s. 11, a discretion to stay proceedings in a suit, where one of the parties has, under an arbitration clause in the deed, in respect of which the suit was instituted, appointed arbitrators; but in the exercise of that discretion, it ought not to stay proceedings, on the ground that the notices to refer relate to other matters besides those the subject of the suit, and questions arise in the suit which do not come within the arbitration clause (5). The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 11, providing for a stay of proceedings and a reference to arbitration by the Court, where the parties have agreed to refer, is to be construed liberally, so as to give effect to such agreements, except in cases of actual fraud, or where some relief is required to keep matters *in statu quo* pending the litigation,—as where a receiver is sought; and it is no reason for refusing the reference that an injunction, of which the object is only to give the plaintiff the benefit of the

(1) *Nichols v. Roe*, 3 My. & K. 431;
5 Sim. 156; *Dawson v. Sudler*, 1 S. &
S. 537; *et vide Featherstone v. Cooper*,
9 Ves. 67.

(2) *Pitcher v. Rigby*, 9 Price, 79.

(3) *Bowes v. Fernie*, 4 My. & Cr. 150.

(4) *Ib.*

(5) *Wheatley v. Westminster and
Brymbo Coal Co.*, 2 Dr. & Sm. 347;
11 Jur. (N. S.) 232.

ultimate decision, is prayed; the parties must be considered to have chosen their own tribunal and their own remedy (1). If an action has been referred at *Nisi Prius* to a referee or arbitrator, that is only a mode of proceeding at Law; and a Court of Equity has no more jurisdiction over a judgment entered in pursuance of the certificate of the referee, than if the amount had been ascertained by a jury (2). Nor, where in an action there has been a reference by order of the Court to an arbitrator, will a Court of Equity enjoin the enforcing of his award, since the matter is already before another jurisdiction competent to reconsider the matter and decide all questions (3).

4. If an award is made after the submission has been revoked by the plaintiff, Equity will not restrain the defendant from acting on the award, unless the plaintiff had good grounds for revoking the submission (4). A plaintiff is not at liberty to ask the aid of a Court of Equity in respect of an act done by him against good faith; and if there is nothing whatever to shew that the power which a plaintiff had given to arbitrators was revoked upon any just and reasonable ground, the Court is bound to conclude that the revocation was a wanton and capricious exercise of authority on his part, and will not interfere on his behalf (5). The power to revoke, without the leave of a Court, a submission to arbitration which does not contain a consent clause for making the submission a rule of Court, is not affected by the Common Law Procedure Act, 1854; and an agreement to refer matters in difference to an arbitrator is revocable by either party at any time before the award is made (6). And a party who has revoked his submission, as to a matter in dispute, before an award has been made, will not be restrained from bringing his action in respect of the matter; the agreement to refer not having been made a rule of Court is, by the revocation, at an end (7).

(1) *Willesford v. Watson*, 20 W. R. 32; 21 W. R. 350; L. R. 14 Eq. 572; L. R. 8 Ch. 473; 42 L. J. (Ch.) 90, 447; 28 L. T. (N. S.) 428.

(2) *Chuck v. Cremer*, 2 Ph. 477.

(3) *Londonderry and Enniskillen Railw. Co. v. Leishman*, 12 Beav. 423.

(4) *Pope v. Duncannon* (Lord), 9 Sim. 177.

(5) *Ib.*

(6) *Thomas v. Anderson*, L. R. 9 Eq. 523; 39 L. J. (Ch.) 468; 18 W. R. 445; 22 L. T. (N. S.) 570.

(7) *Randall v. Thompson*, 24 W. R. 837.

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5. Equity will set aside an award where one of the parties, who had agreed to the reference of the matters in difference to an arbitrator, was not aware of the fact that the arbitrator was largely interested in the concern for which the work had been done, and in respect of which the differences had arisen (1).

6. A Court of Equity will restrain the removal of property, the right to which will depend upon the result of an arbitration, pending the arbitration to decide the questions in difference, and before the award is given (2). The award of an arbitrator finding a damage done by a nuisance is to be treated as a verdict establishing a right, so as to entitle the party to an injunction (3).

7. The power given to a Court by the 17 & 18 Vict. c. 125 (Common Law Procedure Act, 1854), s. 8, to remit matters referred under that Act to the reconsideration of the arbitrator, applies also to matters under the Lands Clauses Act; so also does the power given by s. 15, to enlarge the time for making the award, even after the proper time has expired (4). When the Court refers a matter back to an umpire who has made an award, for reconsideration, that award is avoided altogether (5). And when an award has been made a rule of Court, it comes within the Common Law Procedure Act, 1854, s. 15; and therefore, if it is referred back by the Court for redetermination, and no new award is made within three months, it is still in the discretion of the Court, under that Act, to allow or not, an enlargement of the time for redetermination by the arbitrator (6).

8. Equity will not interfere to restrain Inclosure Commissioners from making an award, though it is disputed whether the lands intended to be inclosed are within their Act of Parliament (7). And it is doubtful whether a Court of Equity can be made subsidiary to such a tribunal, created by Parliament for settling the

(1) *Milnor v. Georgia, &c.*, 4 Geo. 385 (Amr.).

(2) *Garrett v. Salisbury and Dorset Junction Railw. Co.*, 12 Jur. (N. S.) 495; L. R. 2 Eq. 358; 14 W. R. 816.

(3) *Imperial Gas Light and Coke Co. v. Broadbent*, 7 H. L. C. 600.

(4) *Dare Valley Railw. Co. v. Rhys*, 17 W. R. 550; 20 L. T. (N. S.) 717; 38 L. J. (Ch.) 417.

(5) *Ib.*

(6) *Ib.*

(7) *Turner v. Blamire*, 1 Drew. 402; 22 L. J. (Ch.) 766.

rights of parties, upon the mere ground that that tribunal has miscarried in the settlement of those rights (1).

9. Although there are, undoubtedly, authorities which shew that an arbitration clause may oust the jurisdiction of the Court of Chancery, yet if there be an express provision to appoint an arbitrator in a particular manner, and no arbitrator has been appointed, it would be a most unreasonable construction to suppose it excludes the jurisdiction of the ordinary Courts of Law and Equity, except in the case in which it substitutes for them the jurisdiction of the arbitrator, for which it provides (2).

10. If the Legislature has created a statutory obligation between parties to refer matters in difference between them to the decision of an arbitrator, the jurisdiction of the Courts is excluded, and an action will be superseded in respect of a matter which should be settled by such an arbitration (3).

SECT. 14. *Interpleader Suits.*

1. Although it must be now held that a sheriff can, in some cases, file a bill of interpleader, still it is his duty before doing so, to acquaint the judgment creditor with the adverse claim, in order to give him an opportunity, if he should wish it, of withdrawing his own claim before the bill is filed (4), and a claimant under a bill of sale must give the execution creditor an opportunity of examining his claim, before requiring the execution creditor to say if he will accept an issue (5). And in order to obtain an injunction to restrain threatened proceedings at Law, it behoves the sheriff to satisfy the Court that the goods, the subject of the

(1) *Bateman v. Boynton*, L. R. 1 Ch. 359; 12 Jur. 383; 35 L. J. (Ch.) 18, 568; 14 W. R. 119, 598; 13 L. T. (N. S.) 487; 14 L. T. (N. S.) 371.

(2) *Wolverhampton and Walsall Railw. Co. v. London and North Western Railw. Co.*, L. R. 16 Eq. 433, 438.

(3) *Caledonian Railw. Co. v. Greenock and Wemyss Bay Railw. Co.*, L. R. 2 Sc. App. Cas. 347.

(4) *Tufton v. Harding*, 6 Jur. (N. S.) 116; 29 L. J. (Ch.) 225.

(5) *Smith v. Craig*, 16 Ir. Ch. Rep. App. 5.

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seizure, are the goods of the party against whom the writ of *fi. fa.* was issued (1).

2. The owner of lands subject to a charge, is entitled to file a bill against persons setting up conflicting claims to the benefit of the charge, to have their rights declared, and the estate discharged, on payment of the money charged (2). So a party claiming to have a charge upon lands may file a bill to obtain payment of the charge, against the owner of the lands charged, and against other claimants, to restrain those claimants from taking proceedings at Law against the owner of the lands for the recovery of the money charged. The Court will not allow the owner to be vexed by two proceedings in respect of the same matter (3).

3. A tenant cannot file a bill of interpleader against his landlord, on notice of ejectment by a stranger under a title adverse to that of the landlord (4). But a bill of interpleader will lie, where the tenant may be liable to pay the rent to one of two different persons. In the circumstances of that case both the persons claiming the same rent, must claim in privity of tenure and privity of contract; as in the case of mortgagor and mortgagee, trustee and *cestui que trust*; or where the estate is settled to the separate use of a married woman, of which the tenant has notice, and the husband has been in receipt of the rent, and differences arise between them, and she claims the rent. There may be a variety of cases in which the tenant, not disputing the title of the landlord, but affirming that title, the tenure, and the contract by which the rent is payable, but where it is uncertain to whom it is to be paid, may file a bill of interpleader (5). Where there is a mortgage, the tenant is not bound to settle the account between the mortgagor and mortgagee; if the mortgagor will not indemnify the tenant, he has a right to come to a Court of Equity for an indemnity (6). So a tenant may file an interpleader bill against

(1) *Thompson v. Anderson*, L. R. 9 Eq. 523; 39 L. J. (Ch.) 468; 18 W. R. 445; 22 L. T. (N. S.) 570.

(2) *Vyvyan v. Vyvyan*, 4 De G. F. & J. 183.

(3) *Duncombe v. Greenacre*, 6 Jur. (N. S.) 987; 8 W. R. 657.

(4) *Dungey v. Angove*, 2 Ves. Jun. 304, 2nd Ed.; 3 Bro. C. C. 36; *et vide Smith v. Targat*, 2 Anstr. 529; *Johnson v. Atkinson*, 3 Anst. 798.

(5) *Dungey v. Angove*, *supra*.

(6) *Ib.*

his landlord where the question arises on the act of the landlord subsequent to the lease (1).

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4. Proceedings in a suit in Equity may be restrained by an injunction obtained in another and interpleader suit; as where there are two claimants to a fund, and one files a bill against the stakeholder without making the other a party, the stakeholder may file an interpleader bill, and restrain the proceedings in the former suit (2). If, in a sale by auction, both parties claim the deposit, the auctioneer may file a bill of interpleader and obtain an injunction, upon paying the money into Court (3).

SECT. 15. *Prerogatives of the Crown.*

1. A Court of Equity will restrain acts in derogation of the prerogative rights of the Crown in the Crown lands (4). A grant made by the Crown to the inhabitants of a parish is good, though it would seem that such grants cannot be made by private individuals, nor supported on the ground of prescription or custom; and grants by the Crown in derogation of forestal rights are good grants, though they would not be good except in derogation of such rights; and a bill may be sustained by the poor of a parish to whom such a grant has been made—for instance, to cut wood on waste lands within a royal forest for their own use, and for sale to the other inhabitants of the parish. And a Court of Equity will restrain any interference by enclosing or otherwise, with the exercise of the right (5).

2. Foreigners in this country, as well as British subjects, are liable to actions for the injury done by their infringing upon the sole and exclusive right granted by the Crown to patentees of inventions, in conformity with the law and constitution of this country; and the powers of a Court of Equity, which are founded

(1) *Cowtan v. Williams*, 9 Ves. 107.

(2) *Prudential Assurance Co. v.* 303.

Thomas, L. R. 3 Ch. 74; 37 L. J.

(Ch.) 202; 16 W. R. 470; *et vide*

Warrington v. Wheatstone, Jac.

202.

(3) *Farebrother v. Prattent*, 5 Price,

303.

(4) *Att.-Gen v. Mathias*, 4 K. & J.

579; 4 Jur. (N. S.) 628.

(5) *Willingale v. Maitland*, L. R.

3 Eq. 103; 12 Jur. (N. S.) 932.

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on the insufficiency of the legal remedy, can be enforced against them, as well as against British subjects (1).

3. An interdict to protect the public right can be obtained against an individual who, by erecting a wall, encroaches on the seashore (2).

(1) *Caldwell v. Vanvliessen*, 9 Hare, 415. See the 15 & 16 Vict. c. 83, which permits the use of patented inventions in foreign vessels or for their navigation in any port of Her Majesty's dominions, or in any waters within the jurisdiction of any of Her Majesty's Courts, if not used for the

manufacture of goods to be vended within or exported from Her Majesty's dominions, with a proviso excepting ships of foreign states in whose ports British ships are prevented from using foreign inventions.

(2) *Smith v. Earl of Stair*, 2 H. L. C. 807; 13 Jur. 713.

CHAPTER IV.

THE DOCTRINES AND PRINCIPLES AS APPLICABLE TO PERSONS,
AND RELATING TO PERSONS.SECT. 1. *Creditors, Debtors—Principal and Surety—Stakeholder—
Principal and Agent—Landlord and Tenant.*

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1. Equity will not restrain a creditor from prosecuting his legal remedy against the personal representatives of his debtor, unless there is a decree under which the creditor has a right to go in and prove his debt (1).

Creditors,
Debtors.

2. A Court of Equity will not interpose in favour of a debtor and strip a creditor of his advantage at Law, unless the debtor or his representative will discharge the whole of his creditor's demands, equitable as well as legal (2).

3. If a contract is so framed as to render the personal skill of the assignors in a trust deed for the benefit of their creditors, a material portion thereof, a Court of Equity will not restrain an obstruction of the assignees in the deed, in carrying on the agreement (3).

4. Where there is a trust deed for payment of creditors, no creditor being a party to the deed, and not having been made by agreement with any creditor, and without any release or other consideration moving from any creditor; the trust in such a case is voluntary, and a Court of Equity will not enforce it against the author of the trust, and he may vary it as he pleases (4).

5. The principle is this, that where a person does, without the privity of any one, without receiving consideration, and without notice to any creditor, himself make a disposition as between himself and trustees, for the payment of his debts, he is merely

(1) *Ellicott v. The United States*, (N. S.) 166; 33 L. J. (Ch.) 727; 10 7 Gill. 307 (Amr.). L. T. (N. S.) 90.

(2) *Barnewall v. Barnewall*, 3 Ridg. (4) *Wallwyn v. Coutts*, 3 Mer. 707; P. C. 75. 3 Sim. 14; 1b. 1, n.

(3) *Knight v. Burgess*, 10 Jur.

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directing the mode in which his own property shall be applied for his own benefit, and the general creditors, or the creditors named in the schedule, are merely persons named there for the purpose of shewing how the trust property under the voluntary deed shall be applied for the benefit of the volunteers (1). But on the other hand, it is the established law of a Court of Equity, that where there is an actual settlement made for vesting an estate in trustees, or for vesting stock in trustees for volunteers, there, the legal character being complete, the persons who have the legal character are trustees for the volunteers, who may claim as *cestuis que trust* against the trustees under the deed (2). So a conveyance by a debtor to trustees for payment of scheduled creditors, who do not execute the deed or conform to its terms, cannot be enforced by the creditors (3).

6. A Court of Equity will set aside a bargain by which a creditor who, in consideration of his being a surety for the payment to the other creditors of a composition, agrees with the debtor, but without the knowledge of the other creditors, for the payment of his own debts in full (4). In such cases the Court proceeds upon grounds of public policy, and the relief is given on account, not of the individual, but of the public; and therefore a bond to secure one creditor, the deficiency of a composition, not communicated to the other creditors, will be decreed to be delivered up, though to the *particeps criminis* (5).

7. A debtor, under terms to pay the debt by instalments, with a proviso enabling the creditor to sue for the whole sum on failure in punctual payment of any instalment, is justified in paying the creditor, although the creditor may have assigned the debt; if the creditor disputes the validity of his assignment, and gives notice thereof to the debtor, such payment may be continued until the assignee of the debt has obtained an injunction to restrain the debtor from paying the creditor (6).

(1) *Garrard v. Lord Lauderdale*, 139; 35 L. J. (Ch.) 276; 11 Jur. 3 Sim. 1. (N. S.) 905; 14 W. R. 47; 13 L. T. (N. S.) 318.

(2) *Ib.*

(3) *Ib.*; *vide Ellison v. Ellison*, 6 Ves. 656; *Pulvertoft v. Pulvertoft*, 581.

18 Ves. 84.

(6) *Aplin v. Cates*, 30 L. J. (Ch.) 6;

(4) *Wood v. Barker*, L. R. 1 Eq. 9 W. R. 92.

8. If the effect of an agreement by a debtor to hypothecate goods is a forbearance on the part of the creditor, the creditor is entitled to a declaration that there is a lien on the goods and proceeds, for the debt, and to an injunction to restrain dealing with the goods (1).

9. If a question of appropriation and apportionment of payments can be raised by way of defence to an action, and dealt with at Common Law, a Court of Equity will not interfere and restrain the action (2).

10. The doctrines relating to principal and surety are the same at Law and in Equity (3). If the defence to an action at Law on an instrument—as a bond—against a surety is equally open at Law by way of plea, a Court of Equity will not restrain the action (4), nor will it restrain execution on a judgment at Law against a surety, where the surety, as plaintiff in Equity, has already raised the same case at Law (5).

Principal and
surety.

11. A surety who has executed a bond on the faith of its being executed by the principal debtor also, cannot be released from his obligation on the ground that the principal has never executed it, if the principal has executed an instrument on which the surety may sue him and become his specialty creditor (6).

12. The authorities, which are almost innumerable, have settled that upon any giving of time to a principal debtor, if there be any reservation of rights against the surety, the surety is not discharged; for when the right is reserved, the principal debtor cannot say, it is inconsistent with giving him time that the creditor should be at liberty to proceed against the sureties, and that they should turn round upon the principal debtor, notwithstanding the time so given him; for he was a party to the agreement by which that right was reserved to the creditor, and the question whether or not the surety was informed of the arrangement is wholly immaterial (7). But a release stands upon

(1) *Alliance Bank v. Broom*, 13 W. R. 127. *bourne*, 17 W. R. 428; 20 L. T. (N.S.) 339.

(2) *Aberystwith and Welsh Coast Railw. v. Piercy*, 12 W. R. 1000. (5) *Cooper v. Evans*, L. R. 4 Eq. 45; 15 W. R. 609.

(3) *Cooper v. Evans*, L. R. 4 Eq. 45; 15 W. R. 609. (6) *Ib.*

(4) *Stiff v. Local Board of East-*

(7) *Webb v. Hewitt*, 4 K. & J. 438.

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an entirely different footing, for when an actual release is given, no right can be reserved, inasmuch as the debt is gone at Law (1).

13. But though an agreement may not amount to a discharge at Law, yet it may amount to a discharge in Equity, and that will of course release the surety (2). As for instance, if there is an agreement between a bond debtor and his creditor that the latter shall take all the debtor's property, and shall pay his other creditors a certain sum in the pound, this, though not a discharge of the bond at Law by way of accord and satisfaction, because not under seal, still operates in Equity as a satisfaction of the debt, and it is not possible in Equity, upon such a transaction, to reserve any rights against the surety, and any attempt to do so would be void as being inconsistent with the agreement, and a nullity; for if a man, in consideration of the debt due from his principal debtor, agree to buy the whole of his debtor's property, he has been paid, and if he has been paid he cannot reserve his rights, and a Court of Equity will, in such a case, restrain any action by the creditor against the surety (3).

14. If a creditor fraudulently assist the principal debtor to remove from the country, with the intent to hinder and delay the surety in his remedy against the principal, Equity will enjoin the creditor from enforcing his claim against the surety (4).

15. Equity will enjoin a judgment suffered by a surety, on a promise by the creditor that it should only be used to enforce a settlement with the principal, and will relieve the surety if the judgment is too large (5). So Equity will enjoin an action against a surety, where it requires that the debt should be first satisfied from securities of the principal debtor, held by the creditor as a primary fund, especially if there is a doubt as to their validity; Equity holds that this question should be first settled in an action, and at the expense of the creditor (6). A judgment against a surety, upon a note, will not be enjoined on the ground that the note was procured through misrepresentation as to its purpose by

(1) *Webb v. Hewitt*, 4 K. & J. 438; (4) *Smith v. Hays*, 1 Jones, Eq. 321 (Amr.).
et vide Nicholson v. Revill, 4 Ad. & E. 675; *Kearslley v. Cole*, 16 M. & W. 182.

(5) *Cage v. Cassidy*, 23 How. 109; (2) *Webb v. Hewitt*, *supra*. *et vide Dew v. Hamilton*, 23 Geo. 414 (Amr.).

(3) *Ib*.

(6) *Hays v. Ward*, 4 John. Ch. 134 (Amr.).

the principal, unless the payee were also guilty of such misrepresentation (1).

Stakeholder.

16. A stakeholder who seeks to retain part of the stake, is not an indifferent stakeholder, but has a personal question to maintain, and he therefore cannot obtain an injunction to restrain any action against himself, upon the principle of an interpleader bill. Such a bill can only be sustained where the plaintiff holds a stake which is equally contested by the defendants, and as to which the plaintiff is wholly indifferent between the parties, and the right to which will be fully settled by the interpleader between the defendants (2).

17. The duties of an agent are in the nature of personal service, and as such are incapable of being enforced in Equity (3). But a Court of Equity will restrain a party who has been appointed as an agent for certain purposes, from acting in a manner inconsistent with the rights and duties of his principals acting as trustees (4).

Principal and agent.

18. Equity will enjoin an agent for the purpose of obtaining the payment of a note by an action in the name of the payee, from appropriating the proceeds of the judgment to his own use, until the matters shall have been heard and adjudicated (5).

19. If an agent or bailiff confounds his principal's property with his own, or where a man who has undertaken to keep the property of another distinct mixes it with his own, the whole must, both at Law and in Equity, be taken to be the property of the principal or other party, until the agent puts the subject under such circumstances that it may be distinguished as satisfactorily as it might have been before the unauthorized mixture, and the agent is chargeable with the whole, except what he can prove to be his own (6). And if a defendant, in violation of the terms into which he entered with the Court, upon obtaining the dissolution of an injunction, intermix his own property with the plaintiff's, he will be chargeable in account on this principle (7).

20. A Court of Equity will restrain a tenant from pulling down

Landlord and tenant.

(1) *Griffith v. Reynolds*, 4 Gratt. 46 (Amr.).

(4) *Spurgin v. White*, 9 W. R. 266; 7 Jur. (N. S.) 15.

(2) *Mitchell v. Hayne*, 2 S. & S. 63.

(5) *Dunn v. Dunn*, 8 Ala. 784 (Amr.).

(3) *Mair v. Himalayan Tea Co.*, L. R. 1 Eq. 411; 11 Jur. (N. S.) 1013; 14 W. R. 165.

(6) *Lupton v. White*, 15 Ves. 432.
(7) *Ib.*

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a house and building another which his landlord dislikes. It is not sufficient to shew that the house proposed to be built is a better one, or that the landlord does not know his own interest. The landlord has a right to exercise his own judgment and caprice whether there shall be any change (1).

21. A tenant has no equity either to compel his landlord to spend money received by him from an insurance office on an insurance by himself against fire, on the demised premises being burned down, in rebuilding the premises; or to restrain the landlord from suing for the rent until the premises are rebuilt (2).

22. A landlord and his bailiff against whom damages have been recovered for an irregularity in a distress, can sustain a bill to have the damages and costs recovered by the tenant, set off *pro tanto* against the arrear of rent due to the landlord, and to restrain execution in the meantime (3).

23. If a stranger begins to build on land supposing it to be his own, and the real owner, perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error, a Court of Equity will not afterwards allow the real owner to assert his title to the land on which the stranger has expended money on the supposition that it was his own; Equity considers that when the real owner saw the mistake into which the stranger had fallen, it was the duty of the owner to be active to state his adverse title, and that it would be dishonest on the part of the owner to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which he might have prevented (4). But if a stranger builds on land, knowing it to be the property of another, there is no principle of Equity which would prevent the real owner from claiming the land with the benefit of all the expenditure made upon it; there would be nothing in the owner's conduct, active or passive, making it inequitable in him to assert his legal rights (5). So if a tenant builds on his landlord's land, he does not, in the absence of special circumstances, acquire

(1) *Smyth v. Carter*, 18 Beav. 78.

Sch. & Lef. 403, n.; *Maw v. Ulyatt*,

(2) *Leeds v. Cheetham*, 1 Sim. 146.

31 L. J. (Ch.) 33.

(3) *Hamp v. Jones*, 9 L. J. (N. S.) Ch. 258; *vide Beasley v. D'Arcy*, 2

(4) *Ramsden v. Dyson and Thornton*, L. R. 1 H. L. 129.

(5) *ib.*

any right to prevent the landlord from taking possession of the land and buildings when the tenancy has determined; he knew the extent of his interest, and it was his folly to expend money upon a title which he knew would or might soon come to an end (1). But if a tenant, being a mere tenant at will, builds on the land in the belief that he thereby acquires a title afterwards to claim a lease of the land, and the landlord allows him so to build, knowing that he is acting in that belief, and does not interfere to correct the error, it would seem that the tenant would probably be entitled to relief (2). And if a man, under a verbal agreement with a landlord for a certain interest in land, or under an expectation created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation (3).

SECT. 2. *Husband and Wife, Widow—Parent and Child, Infants.*

1. If the Divorce Court has dissolved a marriage and ordered permanent alimony, and the late husband is dissipating his property, or putting it out of his power, a Court of Equity will grant an injunction and a receiver to protect it for the benefit of the former wife (4).

Husband and
wife, Widow.

2. If the claimants of a husband's interest in his wife's property cannot effect a division without the aid of a Court of Equity, a sale of the property will be enjoined till she is suitably provided for (5). So Equity will restrain a husband from proceeding at Law to obtain possession of a legacy which comes to his wife by will, or of her share as next of kin, without providing for her support, unless she is residing apart from him without his consent and without sufficient cause (6).

(1) *Ramsden v. Dyson and Thornton*,
L. R. 1 H. L. 129.

(4) *Sidney v. Sidney*, 17 L. T.
(N. S.) 9.

(2) *Ib.*

(5) *Corley v. Corley*, 22 Geo. 178
(Amr.).

(3) *Ib.*

(6) *Fry v. Fry*, 7 Paige, 461 (Amr.).

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3. A creditor of a married woman cannot, before the hearing of an action to make her separate property liable for the debt, obtain an interim injunction to restrain her from alienating her separate property, for neither the special nor general engagements of a married woman have any further effect against her separate property, than to give the creditor a right to be paid out of it by obtaining execution, no charge is created upon the property (1).

4. A Court of Equity will protect the property of the wife from the husband where he has procured the marriage with a minor to be solemnized by a licence, contrary to the provisions of the Marriage Act of 1823, 4 Geo. 4, c. 76, by which he has incurred a forfeiture of all her property accruing to him by force of the marriage (2). But a conveyance by a woman after a marriage engagement, and upon the eve of marriage, is a fraud upon the rights of the intended husband, and will not be upheld, unless it appears clearly that he had knowledge of the transaction, and assented to it (3).

5. Equity will not permit a husband who has made a post-nuptial settlement in favour of a wife and children, against whom a decree for divorce has been obtained by the wife, to sell or incumber the settled property pending an inquiry as to the provision which ought to be made for the wife; the property comprised in the settlement will be kept *in statu quo* pending that inquiry (4).

6. The acquiescence by a widow in an award and an allotment of lands and mines of which the husband was seised in right of his wife, made during her husband's life with his concurrence, will bind the widow in Equity, and the Court will restrain her from violating their terms (5).

7. A Court of Equity will not permit personal chattels bequeathed to a single woman for her separate use, but without the intervention of any trustee, to be seized in execution by a judgment creditor of an after-taken husband (6). And so of real estate (7).

(1) *National Provincial Bank of England v. Thomas*, 24 W. R. 1013.

(2) *Att-Gen. v. Clements*, L. R. 12 Eq. 32.

(3) *Johnson v. Peterson*, 6 Jones, Eq. 12 (Amr.).

(4) *Watts v. Watts*, 24 W. R. 623.

(5) *Maden v. Veevers*, 5 Beav. 503.

(6) *Newlands v. Paynter*, 4 My. & Cr. 408.

(7) *Smith v. Bank, &c.*, 4 Jones, Eq. 303 (Amr.).

With the assent of the husband, the labour of his wife and minor children may be applied to her separate estate, and a Court of Equity will restrain a creditor of the husband from interfering with such property (1).

8. Although it has been questioned whether, as a rule of Equity, a Court of Equity can enforce by injunction a stipulation to live separate, or not to bring a suit for restitution of conjugal rights (2); yet it is now decided that such a Court will restrain proceeding with a suit in the Divorce Court for restitution of conjugal rights, in violation of a covenant not to compel cohabitation by any legal proceedings, such a covenant being no defence in the Divorce Court to such a suit (3). But if the contract in a separation deed can be set up as a defence by the wife in the Divorce Court, in a suit by the husband for obtaining a divorce, and if the husband in the suit in the Divorce Court allege that the contract was executed in ignorance of the fact that the wife had committed adultery, and on her assertion of innocence, a Court of Equity will not interfere to stay proceedings in the Divorce Court (4).

9. A Court of Equity can enforce specific performance of an agreement by which a person has bound himself to execute a deed, although such a deed may be a deed of separation between himself and his wife (5); and although it is perfectly true that a Court of Equity does not interfere with any question respecting the restitution of conjugal rights, and leaves such questions entirely to the Court of Probate, as having jurisdiction in such matters, yet a Court of Equity deals with covenants which parties enter into, and if a party chooses to enter into a covenant restraining himself from proceeding in a matter in respect of which a Court of Equity may not have jurisdiction, yet having jurisdiction in matters of contract, the Court will restrain him from violating his covenant (6); and can carry into effect executory

(1) *Johnson v. Vail*, 1 M'Cart. 423 (Amr.).

(2) *Wilson v. Wilson*, 5 H. L. C. 40; 23 L. J. (Ch.) 697.

(3) *Hunt v. Hunt*, 31 Beav. 89; 8 Jur. (N. S.) 85; 31 L. J. (Ch.) 161; 10 W. R. 215; 5 L. T. (N. S.) 778.

(4) *Brown v. Brown*, L. R. 7 Eq. 185; 38 L. J. (Ch.) 153; 19 L. T. (N. S.) 594; 17 W. R. 98.

(5) *Wilson v. Wilson*, 5 H. L. C. 40; 23 L. J. (Ch.) 697.

(6) *Saunders v. Rodway*, 16 Beav. 207; 16 Jur. 1005.

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contracts of that description (1). And a covenant by the husband not to sue for the restitution of conjugal rights is a usual covenant, and therefore an integral valid portion of a deed of separation, and in carrying into effect such executory contracts, there is a right to insist upon having such a covenant inserted (2); and although a Court of Equity will not carry into execution articles of separation between husband and wife, yet engagements entered into between the husband and a third party are valid and binding, although they originate out of, and relate to, an unauthorized state of separation, in which the husband and wife have endeavoured to place themselves (3); and it is no objection to a deed of separation that the trust is voluntary, as for instance, for want of a covenant on the part of the trustee to indemnify the husband (4). But a voluntary deed founded on an agreement by which a husband makes a provision for his wife in case of a future separation, is radically defective and altogether void at Law, so far as it is an agreement between husband and wife, and will be set aside (5).

10. A Court of Equity will not exercise its jurisdiction over alimony as such, either to compel or to restrain its payment, except so far as to grant a writ of *ne exeat* against the husband (6). But in a suit in Chancery to restrain the prosecution by the wife, of a suit for judicial separation, and from proceeding in the Divorce Court for alimony, where a separation deed has provided for alimony, the Court, though it may not, upon an interlocutory application, restrain the proceedings for judicial separation, and proceeding for alimony *pendente lite*, will put the wife upon an undertaking to deal with any order the Divorce Court might make as to alimony, as the Court of Equity should direct (7). But the Court can in such a case restrain the prosecution of a petition for alimony *pendente lite* (8).

(1) *Hunt v. Hunt*, 31 Beav. 89;
8 Jur. (N. S.) 85; 31 L. J. (Ch.) 161;
10 W. R. 215; 5 L. T. (N. S.) 778;
Wilson v. Wilson, 5 H. L. C. 40; 23
L. J. (Ch.) 697.

(2) *Ib.*

(3) *Worrall v. Jacob*, 2 Mer. 269.

(4) *Frampton v. Frampton*, 4 Beav.
287.

(5) *Procter v. Robinson*, 15 W. R.
138; 35 Beav. 329; 14 W. R. 381.

(6) *Vandergucht v. De Blaquiére*,
5 My. & Cr. 229; 8 Sim. 315.

(7) *Williams v. Baily*, L. R. 2 Eq.
731.

(8) *Flower v. Flower*, 20 W. R.
231; 25 L. T. (N. S.) 902.

11. An agreement between husband and wife which is contrary to the law and policy of this country, cannot be enforced here, though it may be a good contract by the law of the country in which the agreement was made. If a contract be in breach, fraud, or evasion of the law of this country, or contrary to its policy, the Courts of this country cannot enforce it; therefore, an agreement containing a provision that one of the children of the marriage should remain under the care of the mother, and that the wife would facilitate the obtaining of a divorce, in a suit instituted by the husband for that purpose, in England, is, as to the first provision, in contravention of the settled law and policy of this country; that law giving to the father the custody of the children, and the control over them, not for his own gratification, but on account of his duties, and with reference to the public welfare (1); and is, as to the second provision, contrary, and nothing more so, to the policy of, and repugnant to our law, both as to the object which it has in view, and the means by which that object is to be effected (2). But although a father cannot by agreement deprive himself of the control of his children, an agreement that the holidays of the children from school shall be passed where trustees shall direct, is reasonable, and will be enforced by the Court, where the father retains the control of the children's education, and there is nothing that amounts to an abnegation of parental power, in respect of which, the law of England regards a father as a person who has duties which he cannot renounce—the duties of caring for, and seeing to the due education of his children (3). And if an agreement is so objectionable that a Court of Equity will not perform it, it cannot be rendered capable of performance by the objectionable parts having already been carried into execution (4). But though one covenant in a separation deed be bad, that does not make the

(1) The 36 Vict. c. 12, s. 2, enacts that no agreement in a separation deed between the father and mother shall be held invalid by reason of its providing that the father shall give up the custody or control of infants to the mother, but such an agreement is not to be enforced if the Court is of opinion

that it will not be for the benefit of the infants.

(2) *Hope v. Hope*, 8 De G. M. & G. 731, 743.

(3) *Hamilton v. Hector*, L. R. 6 Ch. 701; 40 L. J. (Ch.) 692; 19 W. R. 990.

(4) *Hope v. Hope*, 8 De G. M. & G. 731, 743.

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whole deed bad ; there may be deeds the substance of which may be carried into effect, but part of which may be either inoperative or wholly void (1).

12. A Court of Equity will restrain proceedings at Law upon instruments obtained upon an agreement that a woman should marry such a man, since it is contrary to the nature and design of marriage, which ought to proceed from a free choice, and not from any compulsion (2).

13. A contract entered into and paid for by a wife, without the knowledge, but for the benefit of her husband, is valid and binding when ratified by the husband, and a Court of Equity will restrain an action of ejectment brought to recover land which has been the subject of such a transaction, from the husband (3). A purchase of goods by a married woman from her husband, through the medium of trustees, for her separate use and appointment, may be sustained against his creditors, and a Court of Equity will restrain the disposition of the goods purchased, taken in execution under judgments obtained against the husband by his creditors, if the purchase by the wife is *bonâ fide*; it is of no consequence whether it is before or after the marriage, though the husband is indebted at the time, and even though the object is to preserve from his creditors, for the family, the subject of the purchase. The circumstances of the comparative value of the consideration, the continued possession (according to the title by the relation of the parties), the degree of notoriety, the want of an inventory, the satisfaction of some debts out of the property, &c., though circumstances of evidence, are not conclusive as to the nature of the transaction (4).

Parent and
child, Infants.

14. A contract by which a father deprives himself of all his parental control over his child, is contrary to the policy of the Law, and void (5). That rule of Law is grounded on this, that such a contract is opposed to the welfare of the child, but such a contract is valid, and not void on the ground of public policy, if the conduct of the father towards his child is so gross that a

(1) *Hamilton v. Hector*, L. R. 13 Eq. 511, 522.

(2) *Key v. Bradshaw*, 2 Vern. 102, 139.
2nd Ed.

(3) *Millard v. Hervey*, 34 Beav. 237.

(4) *Arundell (Lady) v. Phipps*,
Arundell (Lady) v. Taunton, 10 Ves.

(5) See note (1), p. 275.

Court of Equity would remove the child from his custody as being injurious to, and opposed to the welfare of the child, and the performance of the contract will be enforced by injunction (1). The power of a Court of Equity to control the rights of a father over his children where he has grossly misconducted himself is indubitable (2); and under circumstances of improper conduct, the Court will restrain a father from interfering with the management and education of his son, a ward of the Court (3). In England a man who holds that prayer, as entreaty and supplication to the Almighty, is no part of duty, is superfluous, and that no day ought to be observed as the Sabbath, is to be deemed as entertaining opinions noxious to society, adverse to civilization, opposed to the usages of Christendom, contrary (as to prayer), to the express commands of the New Testament, and is disqualified for having the guardianship of an English child, although his own, and he will be restrained by a Court of Equity from interfering with the child (4). But if the father wish his child to be under the guidance, care, and instruction under which he has placed it, a Court of Equity has no right to have an opinion—provided the father's conduct is free from impropriety or bad motive—as to whether the father is judicious or not in the particular training he may direct the child to undergo, and would not interfere with the father's decision in applications by mothers under the 2 & 3 Vict. c. 54, for obtaining access to and custody of children under the age of seven years (5). If the Court thinks it is for the benefit of the ward it will restrain a father from taking his child out of the kingdom (6).

15. The general doctrine of the Court of Chancery is, that the children should be brought up in the religion of their

(1) *Swift v. Swift*, 4 De G. J. & S. 710, 714; 34 Beav. 266; 34 L. J. (Ch.) 209, 394; 11 Jur. (N. S.) 458, 1148.

(2) *Ib.*

(3) *Creuze v. Hunter*, 2 Cox, 242; *et vide Ex parte Warner*, 4 Bro. C. C. 101.

(4) *Thomas v. Roberts*, 19 L. J. (N. S.) Ch. 506.

(5) *Winscom, In re*, 11 Jur. (N. S.) 297; 13 W. R. 452. The 2 & 3 Vict.

c. 54, is repealed by the 36 Vict. c. 12, which gives to the Court of Chancery power to order that a mother may have access to infants until they are sixteen years of age, and to order them to be given into her custody until that age, subject to such access by the father as the Court shall deem proper.

(6) *De Manneville v. De Manneville*, 10 Ves. 52, 56.

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father (1). But the Court will have regard to the tender age and health of an infant, and will allow it to remain under the care of its mother and guardians—though the mother is of a different religion to the deceased father—until the infant is seven years of age (2).

16. Though the Court of Chancery has jurisdiction to restrain a father from interfering with the religious education of his infant child, that jurisdiction will not be exercised unless the Court sees that the interference of the father will be injurious to the happiness and welfare of the child (3).

17. An agreement made before marriage between intended husband and wife of different religions that the boys shall be educated in the religion of the father and the girls in that of the mother, is not binding as a legal contract, nor can it be enforced in Equity (4). But if a father has forfeited or abandoned his right to educate his children in his own religion, the Court will consider only the happiness and benefit of the child, and will order it to remain in the care of those by whom it has been brought up, and to be educated in their religion, although the child may not have so far imbibed the particular doctrines of that religion as to render it dangerous to change its religious training (5).

18. A Court of Equity will restrain all communication with an infant ward of Court by a party attempting to contract a marriage with the ward, if the Court is of opinion that there is a disparity in the ages of the parties (6); or that the marriage would be an improper one (7). And if a marriage has been contracted with a ward without the consent of the Court, it will, if it thinks that the marriage is a disparagement of the ward, restrain all intercourse between the ward and her husband, and if it thinks proper will keep the husband in custody until a proper settlement has been made (8).

(1) *Newbury, In re*, L. R. 1 Eq. 622, 636; 21 W. R. 431, 616; 28 L. T. (N. S.) 686.

(2) *Austin v. Austin*, 34 Beav. 257 (5) *Ib.*

(see note (5), p. 277). (6) *Pearce v. Crutchfield*, 14 Ves. 206.

(3) *Meade, In re*, 5 Ir. R. Eq. 98; (7) *Darson v. Thompson*, 12 L. T. (N. S.) 178.

19 W. R. 313. (8) *Bathurst v. Murray*, 8 Ves. 74.

(4) *Andrews v. Salt*, L. R. 8 Ch.

19. An infant is entitled to treat a person who enters on his estate during his infancy as his bailiff, who is accountable as such (1). And the Court will, upon the infant attaining twenty-one, assist him in bringing an action of ejectment against such a person, by restraining the setting up of any outstanding legal estate (2).

SECT. 3. *Authors, Publishers—Actors.*

1. A Court of Equity will restrain the violation of agreements between authors and publishers, for instance, agreements with respect to the right to the exclusive services of an author for a periodical, and will enjoin their determination before the agreed period, and also enjoin the engaging in any other work contrary to a stipulation in such agreements (3). So such a Court will construe and carry into effect agreements between authors and publishers for the publication of works upon specific terms as to the expense and division of the profits (4).

2. The right and property which an author or composer of any work, whether of literature, art, or science, has in such work unpublished, and kept for his private use and pleasure, entitles the author or composer to withhold the same altogether, or so far as he may please, from the knowledge of others; and a Court of Equity will restrain an invasion of this right by the publication of a catalogue containing a description of such work. So the Court will interfere to prevent a party from availing himself of a possession of etchings or impressions of a work, where the possession originates in a breach of trust, confidence, or contract; in such cases a Court of Equity exercises an original and independent jurisdiction to prevent a wrong arising from a violation of right, or breach of contract or confidence (5).

3. The author of a separate article in a periodical, has, under the 5 & 6 Vict. c. 45, s. 18, the right to prevent a separate pub-

(1) *Blomfield v. Eyre*, 8 Beav. 250. 271; 4 K. & J. 656; 4 Jur. (N. S.)

(2) *Ib.* 82; 27 L. J. (Ch.) 254.

(3) *Stiff v. Cassell*, 2 Jur. (N. S.) 348. (5) *Prince Albert v. Strange*, 2 De G. & Sm. 652; 1 Mac. & G. 25; 1 H.

(4) *Reade v. Bentley*, 3 K. & J. & T. 1.

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lication, and a Court of Equity will restrain the violation of the right, and it is not necessary to enter the work at Stationers' Hall (1).

4. A party who is one of the proprietors and partners, and also editor of a periodical, will, on a dissolution of the partnership, be restrained from advertising that the publication will be discontinued; the right to use the name of the work is part of the partnership assets, and must be sold for the benefit of all the partners (2). The Court will restrain a publisher from issuing a newspaper with a colourable imitation of the name of another newspaper, and as a continuation of that newspaper (3). An agreement by a publisher not to publish in future a magazine of a particular description, is like the case of an agreement by the proprietor of a particular article of trade, after disposing of it to another, not to deal with that article again, and is not void as a too general restraint on trade, and the Court will restrain the breach of such an agreement (4).

Actors.

5. A Court of Equity will construe agreements between actors and managers of theatres, and will enforce or refuse to enforce such agreements according to the circumstances of the case (5). But if a manager has broken an implied engagement on his part in a contract, the Court will not restrain an actor from breaking an implied engagement on his part in the contract (6). If a contract between an actor and a manager contain an implied engagement only on the part of the actor that he will not perform at any other theatre for a certain period, the Court will restrain him from so doing, it is not necessary that such a contract should contain an express negative stipulation not to do so (7).

(1) *Mayhew v. Maxwell*, 1 J. & H. 312; 9 W. R. 118.

(2) *Bradbury v. Dickens*, 27 Beav. 53; 28 L. J. (Ch.) 667.

(3) *Prowett v. Mortimer*, 2 Jur. (N. S.) 414.

(4) *Ainsworth v. Bentley*, 14 W. R. 630.

(5) *Fechter v. Montgomery*, 33 Beav. 22.

(6) *Ib.*

(7) *Montague v. Flockton*, L. R. 16 Eq. 189, 198; 42 L. J. (Ch.) 677; 21 W. R. 668; 28 L. T. (N. S.) 580; *et vide Webster v. Dillon*, 3 Jur. (N. S.) 432.

SECT. 4. *Officers of the Court—Receivers, Sequestrators.*PART II.
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Court.

1. Wherever the title to redress against an officer of a Court of Equity is founded on a denial of his authority, or on an alleged defect in the order which he has executed, that Court (which is alone competent to decide upon the validity of its own orders) is bound to interpose by injunction, and assume exclusive jurisdiction over the matter of complaint (1). And further, such a Court will not permit proceedings in another Court to be continued, where the question to be tried is how far its officers have conducted themselves with propriety in the execution of its orders (2). Nor will it allow proceedings in other Courts for an improper execution of its orders (3). And compensation can be got in a Court of Equity only, for any misuse of its own process (4).

2. A Court of Equity will not, unless with its leave, permit its receiver to be interfered with or dispossessed of the property of which he is appointed receiver, nor will it allow payment to him to be intercepted, although the order appointing him may be perfectly erroneous (5). Nor will the Court allow its sequestrators to be dispossessed (6). But the Court will restrain its receiver from prosecuting an unjust and vexatious suit at Law (7).

Receivers,
Sequestrators.SECT. 5. *Barrister, Counsel—Solicitor, Attorney.*

1. A barrister who has been legal adviser to a party, and in one case in particular, of a controverted claim, will not be allowed to buy up the claim, which his client had sought to compromise, though the relation of counsel and client has ceased; and if a counsel makes such a purchase, it will be held a trust for his

Barristers,
Counsel.

(1) *Aston v. Heron*, 2 My. & K. 390.

(2) *Ex parte Clark*, 1 Russ. & My. 563.

(3) *Hyde v. Holmes*, 2 Moll. 273; *Batchelor v. Blake*, 1 Hog. 198.

(4) *Nugent v. Nugent*, 2 Moll. 372.

(5) *Ames v. Birkenhead Docks (Trustees of)*, 20 Beav. 332.

(6) *Pelham (Lord) v. Newcastle (Duchess)*, 3 Sw. 289.

(7) *Matter of Merritt*, 5 Paige, 125 (Amr.).

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former client (1). A deed of gift, or a contract executed by a client in favour of a barrister who has brought a protracted and complicated litigation to a successful issue, will be set aside upon evidence of undue influence over or want of independent advice on the part of the client (2).

2. A Court of Equity will restrain by injunction a counsel from divulging secrets of a former client (3).

3. If parties do not take the usual means of securing the professional assistance of counsel, the Court will not interfere in questions arising upon the practice of retainer, and will decline to restrain a particular counsel who has acted for one party in a cause, from acting as counsel for another and opposite party in the cause (4).

4. A Court of Equity will not suffer counsel to maintain an action for fees, which are *quiddam honorarium*; nor, if a counsel happens to be a mortgagee, will it admit such a clandestine way of coming at his fees, as to permit him to insist upon more interest than he is entitled to (5).

5. A Court of Equity will restrain a solicitor from violating the stipulations of a bond entered into, to prevent his practising within an agreed distance of a place, and his acting as agent or legal adviser for a certain party (6). And a covenant by an articulated clerk not to practise as a solicitor within the City of London or the counties of Middlesex or Surrey is a reasonable restriction and will be enforced (7).

6. A solicitor will be restrained from communicating to a party who is suing a former client, documents, or matters of evidence, which came to the possession or knowledge of the solicitor in respect of his employment for such client; and the party will be restrained from using in any action, or otherwise, any docu-

(1) *Carter v. Palmer*, 1 Ir. Eq. Rep. 289; 1 D. & Wal. 722.

(2) *Brown v. Kennedy*, 4 De G. J. & S. 217; 33 Beav. 133; 33 L. J. (Ch.) 342; 10 Jur. (N. S.) 141.

(3) *Carter v. Palmer*, 1 Ir. Eq. Rep. 302.

(4) *Baylis v. Grout*, 2 My. & K. 316; *et vide Ex parte Else, In re*

Joiner, Mont. 69; *Ex parte Lloyd*, Ib. 70, note (a).

(5) *Thornhill v. Evans*, 2 Atk. 332; 9 Mod. 331.

(6) *Edmonds v. Plews*, 6 Jur. (N. S.) 1091.

(7) *May v. O'Neill*, 44 L. J. (Ch.) 660 (*et vide* Pt. II., chap. 2, s. 3, p. 230, ante, "Restraint of Trade").

ments or matters of evidence which he has so obtained (1). But a clerk to a solicitor, commencing practice for himself, will not be restrained from acting as solicitor for parties against whom his master was employed, upon general allegations of his having, in his former service, acquired information likely to be prejudicial to the clients of his master (2). And the Court will not restrain a solicitor who has acted, to a certain extent only, for defendants in an amicable suit, from acting in another suit instituted by some of those defendants against others of them, where he swears that he is not confidentially possessed of any secrets which might be used to the prejudice of such other defendants, and that he has no knowledge of any facts unknown to his clients (3).

7. If a client, a managing executor, discharge his solicitor, the Court will not restrain the solicitor from acting as solicitor for the plaintiffs in a cause in which the former client is defendant as managing executor (4); though if a solicitor who has been discharged voluntarily makes communications of what has come to his knowledge confidentially, it is a great breach of his duty, and it would seem that the Court would restrain the solicitor from making such communications (5). But the Court will restrain a solicitor, who has virtually discharged himself from a client, from communicating to another client who has commenced proceedings against the former client, in respect of a matter, as, for instance, the negotiation of an agreement, in which the solicitor had been engaged for that former client, any information relating to the agreement that came to his knowledge confidentially as the solicitor of the former client (6). Nothing can be considered a greater breach of professional duty than for a solicitor, first of all, as the solicitor of one party, to carry on a negotiation for the benefit of that party, and have it completed, and afterwards to act as the solicitor for other parties, in order, by his own personal knowledge of the transaction, to destroy that which he has done for his former client (7). An attorney or solicitor discharging

(1) *Lewis v. Smith*, 1 Mac. & G. 417. Sim. 258; *sed vide Biggs v. Head*, Sau. & Sc. 335.

(2) *Bricheno v. Thorp*, Jac. 300.

(5) *Beer v. Ward*, Jac. 77.

(3) *Robinson v. Mullett*, 4 Price, 353.

(6) *Davies v. Clough*, 8 Sim. 262, 269.

(4) *Parratt v. Parratt*, 2 De G. &

(7) *Ib.*

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himself, or being removed by the effect of an agreement made upon a dissolution of partnership, and not by the discharge of the client, is not in the situation of a solicitor discharged by the client, and therefore cannot become the solicitor of the other party in the same cause (1). And so a solicitor voluntarily changing his situation will be prevented from giving evidence of his client's secrets, or from proceeding to communicate a material fact, even by striking him off the rolls (2). Solicitors in partnership cannot dissolve their partnership as against their client, without his consent, so as to enable the retiring partner, as discharged, to act against him (3); or so as to turn over their client to one of themselves (4).

SECT. 6. *Executors, Administrators—Devisee.*

Executors,
Administra-
tors.

1. The personal representatives of a person deceased are the proper parties to sue to recover the assets, and parties interested in the estate, not being the legal personal representatives, will not be allowed to sue for that purpose, unless it be satisfactorily shewn that assets exist, which might be recovered, and which, but for such suit, would probably be lost to the estate; and after a decree for administration, a legatee cannot sue the debtors to recover the assets, in the absence of any refusal or neglect of the personal representatives to do so (5). And it is not sufficient ground in such a case, to entitle a residuary legatee to file a bill for that purpose against executors who are also shareholders and officers of a company in which their testator was a shareholder, that the executors have interests which conflict with their duty; it must be shewn that the executors intend to neglect the performance of the duties of their office (6). The general principle, in cases where plaintiffs have been allowed to enforce claims, the right of doing which is vested in another, so far as those cases relate to the assets of deceased persons, in cases of executors and surviving partners of the testator, is this, that such a bill may be supported

(1) *Cholmondeley (Earl) v. Lord Clinton*, 19 Ves. 261.

(2) *Ib.* 268.

(3) *Ib.* 273.

(4) *Cook v. Rhodes*, 19 Ves. 273, n.

(5) *Stuinton v. Carron Co.*, 18 Beav. 146.

(6) *Ib.*

in all cases where the relation between the executors and the surviving partners is such, as to present a substantial impediment to the prosecution by the executors of the rights of the parties interested in the estate (1). A suggestion by the trustees of a fund that the administrator of the *cestuis que trust*, who, in that character, is entitled to a distributive share of the fund, has unfairly obtained the letters of administration under which he claims such share, is no defence to a claim of the administrator (2).

2. Although an administrator is, by the sentence of the Court which granted the letters of administration, both legally and equitably entitled to the assets of the intestate (3), and a Court of Equity is not at liberty to question the validity of the appointment, in the proper Court, of executor (4); yet a Court of Equity will, in a proper case, as on the ground of insolvency, restrain an administrator from transferring the intestate's stock into his own name; and it would seem that such an injunction will, by equitable construction, operate to prevent his parting with any of the intestate's outstanding estate, which has previously come to his hands (5). And the Court will restrain a defendant who is alleged to have improperly obtained probate and to be insolvent, from receiving the testator's assets and from prosecuting actions at Law for that purpose (6). So a Court of Equity will restrain an executor, who is residing out of the jurisdiction and is insolvent, from prosecuting proceedings at Law to obtain a fund belonging to the estate, which it is feared may be wasted, until he submits himself to the jurisdiction of the Court (7). An executor claiming under a will and also by gift from a testatrix in her lifetime, will, upon evidence of undue influence, be restrained from converting furniture and other specific property into money (8).

3. The pendency of a suit in a Court of Probate to have the probate or letters of administration recalled, is not of itself a sufficient ground to induce a Court of Equity to grant an injunction

(1) *Travis v. Milne*, 9 Hare, 149;
Stainton v. Carron Co., ante.

(2) *Devey v. Thornton*, 9 Hare, 22.

(3) *Maker v. Gorman*, 6 Ir. Eq.
Rep. 304.

(4) *Thornton v. Curling*, 8 Sim.

(5) *Scott v. Beecher*, 4 Price, 346.

(6) *Mansfield v. Shaw*, 3 Madd. 100.

(7) *Dougherty v. Walker*, 15 Geo.

442 (Amr.).

(8) *Edmunds v. Bird*, 1 V. & B.

512.

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and receiver against the personal representative, to restrain him from receiving the assets (1). It would be different if there were fraud or improper conduct (2). However, if the executor has agreed that the validity of the testamentary paper by which he was appointed, shall be tried in a suit to recall probate, the Court will grant an injunction and a receiver (3). There is no doubt that, by the rule of the Court of Equity, if the representation is in contest, and no person has been constituted executor, the Court interferes, not because of the contest, but because there is no proper person to receive the assets. If there be a contest who shall be executor or administrator, and there is nothing to shew who is entitled to be considered as sustaining either of those characters, the interference of a Court of Equity is quite of course (4). And if an executor agree that the validity of the testamentary papers by which he was appointed shall be tried in a suit to recal probate, that will justify the Court in interfering, since he treats himself as not being complete executor (5). Equity will not permit a party claiming to be widow of a deceased person to take possession and dispose of any part of the personal estate, where there is a question as to her marriage, and there is a claim for a grant of administration by one of the next of kin (6). If a will is being litigated in the Probate Court on a suggestion that it was unduly obtained, the executor, being supposed to be insolvent, will be restrained from getting in the debts of the deceased, *pendente lite* (7). The Court will restrain an insolvent executor who is getting in the assets before probate, from so doing (8).

4. After the usual administration decree in a creditors' suit in a Court of Equity, that Court will stay all further proceedings in an action by a creditor against the executor (9). The result of per-

(1) *Connor v. Connor*, 15 Sim. 598; D. & A. 41; 34 L. T. 854. See the
et vide Watkins v. Brent, 1 My. & Cr. Judicature Act, 1873, s. 25, subs. 8.
97; 7 Sim. 512.

(2) *Watkins v. Brent*, *supra*.

(3) *Ib.*

(4) *Ib.*

(5) *Watkins v. Brent*, 1 My & Cr.
97, 104.

(6) *Brand v. Mitson* (otherwise
Brand), 24 W. R. 524; 45 L. J. P.

(7) *Smallpiece v. Anguish*, 1 Ch. Ca.
75.

(8) *Smith v. Aykwell*, 3 Atk. 566;
S. C. sub. nom. *Smith v. Haytwell*,
Amb. 66.

(9) *Vernon v. Thelluson*, 1 Ph. 466;
14 L. J. (N. S.) Ch. 83; 7 Jur. 503.

mitting the action to go on, would be that the assets which would have been recovered in the action, would have been withdrawn from the general fund, which ought to be distributed in the Court of Equity for the common benefit of all the creditors (1). But the Court in these cases requires to be informed of the state of the assets, before it will stay the proceedings at Law (2). If executors plead the decree in an administration suit, to an action brought by a creditor, which plea is held bad by the Court of Law and judgment given for the plaintiff, the Court of Equity will restrain the latter from proceeding against the assets of the testator, but will not deprive him of any right at Law the judgment may give him against the executors personally (3). The rule of a Court of Equity is, that if the executor does, at Law, so manage the matter as to make himself personally liable, such a Court will leave him to be dealt with at Law as the Court of Law will permit, but a Court of Equity will not suffer any judgment that may be recovered at Law to interfere with its own decree (4). In cases proper for Law a man must defend himself by legal pleadings, and every executor ought to be careful, in the first place, to cover all his assets with a judgment (5). But if executors have misapplied the assets, the Court will not restrain execution upon a judgment, *de bonis testatoris, et si non, de bonis propriis*, obtained at Law, before the decree for an account, in a suit by legatees against the executors (6).

5. If, upon a bill to establish a will and to have the trusts executed, a verdict in favour of the will, on an issue *devisavit vel non* directed to be tried, has been given, and upon the hearing of the cause on the equity reserved, the will is decreed to be established, and the trusts executed; the Court will grant a perpetual injunction to restrain proceedings at Law in ejectment for recovery of the estates devised, by a devisee of the heir-at-law of the original testator (7).

(1) *Vernon v. Thelluson*, 1 Ph. 466; 569; *Brook v. Skinner*, 2 Mer. 481 n.; 14 L. J. (N. S.) Ch. 83; 7 Jur. 503. *Ramsden v. Jackson*, 1 Atk. 294.

(2) *Ib. Paxton v. Douglas*, 8 Ves. 520; *Gilpin v. Lady Southampton*, 18 Ves. 469.

(3) *Burles v. Popplewell*, 10 Sim. 383; *vide Kent v. Pickering*, 5 Sim.

(4) *Burles v. Popplewell, ante.*

(5) *Anon.*, 1 Vern. 119.

(6) *Lee v. Park*, 1 Keen, 714.

(7) *Lowe v. Joliffe*, Dick. 388.

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CHAPTER IV.

SECT. 7. *Sovereign, Sovereign Prerogatives—Ambassadors.*

Sovereign,
Sovereign
prerogatives.

1. Although a Court of Equity will not interfere to protect the invasion of a mere sovereign right, nor interfere in aid of the prerogative of a foreign sovereign—as for instance the use, in this country, of the royal arms of a foreign state—yet it is different as to the right to regulate the coinage and issue of notes for payment of money, as part of the circulating medium; for though this is part of the sovereign prerogative recognised by the law of nations, which is part of the Common Law of England, still, money being the medium of commerce, a foreign sovereign in amity with this country, suing in the Court of Chancery to protect his prerogative right of issuing coin, or paper money, will have his right protected from invasion; and the Court will protect, by injunction, the property to which he is entitled as sovereign, or of his subjects, being represented by him, where a damage to such property is done or threatened by persons resident within the jurisdiction of the Court (1).

2. Courts of Law, although they will preserve the private rights of sovereign princes, if by so doing the sovereign acts of the state are not interfered with, cannot take cognizance of acts of power exercised by governments in matters of state arising out of war; the acts of a government, performed in exercise of its sovereign and political power, are not subject to the control of Courts of Law or Equity (2). The transactions of independent sovereign states between each other are governed by other laws than those which municipal Courts administer, and such Courts have neither the means of decreeing what is right, nor the power of enforcing any decisions which they may make (3).

Ambassadors.

3. Although the Courts in this country cannot make an order against a foreign ambassador who does not submit himself to the jurisdiction, yet the Court of Chancery will restrain a third party from handing over to him a fund, the right to which is in dispute,

(1) *Emperor of Austria v. Day and Kossuth*, 2 Giff. 628; 7 Jur. (N. S.) 483, 639; 9 W. R. 568; 30 L. J. (Ch.) 690.

(2) *Wadeer v. East India Co.*, 7 Jur. (N. S.) 350; S. C. *sub. nom. Veer*

Rajundur Wadeer v. East India Co., 30 L. J. (Ch.) 226; 9 W. R. 247.

(3) *Secretary of State for India v. Kamachee Boye Sahabor*, 13 Moo. P. C. 22; 7 Moo. Ind. Ap. 476.

and that, notwithstanding his title to the fund may be absolute at Law (1). An injunction cannot be sustained against the agent of a foreign government, whose business in this country is only that of settling certain claims upon the foreign government, but whose acts in that capacity are done entirely under the ambassador of the foreign country resident in this country (2). A foreign sovereign can, but his minister cannot, sue in respect of the property of that sovereign (3).

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SECT. 8. *Felons, Felony—Libel, Crimes, Reputation, Mercantile Credit.*

1. The rule of law, that a felon cannot be sued upon a civil action in respect of a transaction which amounts to felony, is a rule of public policy. The reason of the rule is, that persons who have been defrauded by felonious acts, should do their duty to the public by prosecuting for felony, before they seek redress for the private injury to themselves in a Civil Court; but where public policy ceases to require its operation, the rule ceases to operate also; and if a party commits an act said to be felonious, and dies before the felony is discovered, the operation of the rule of public policy is never required, and a prosecution for felony has become impossible; and a Court of Equity will restrain the personal representative of such a party from continuing proceedings at Law against the party who was defrauded by him, to obtain possession of assets in that party's hands, upon a bill by him for the administration of the estate of the deceased felon (4).

Felons,
Felony.

2. A Court of Equity has no jurisdiction to stay the publication of a libel by injunction (5). It is clearly settled that the Court of Chancery has no jurisdiction to restrain the publication of state-

Libel, Crimes,
Reputation,
Mercantile
credit.

(1) *Gladstone v. Musurus Bey*, 1 H. & M. 495; 9 Jur. (N. S.) 71; 32 L. J. (Ch.) 155.

(2) *Service v. Castaneda*, 2 Coll. 56.

(3) *Penelo (Baron) v. Johnson*, 22 W. R. 103; 29 L. T. (N. S.) 452; *United States of America v. Wagner*, L. R. 2 Ch. 582; 15 W. R. 634; *Schneider v. Lizardi*, 9 Beav. 461;

Don Diego de Acuna v. Bingley, Hob. 113 b.

(4) *Wickham v. Gatrill*, 2 Sm. & Giff. 353; 18 Jur. 768; 23 L. J. (Ch.) 783; *vide Chowne v. Baylis*, 31 Beav. 351; *Stone v. Marsh*, 6 B. & C. 562; *Marsh v. Keating*, 1 Bing. N. C. 217.

(5) *Clark v. Freeman*, 11 Beav. 112.

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ments, or expressions, or comments with reference to property, or trade or business—merely because the publication thereof is a libel (1). It has no jurisdiction to restrain the publication of a libel merely because it is a libel (2). Still, though it is clear that the Court of Chancery has no jurisdiction to restrain acts which amount to the commission of a crime only, and being merely criminal or illegal only, yet, notwithstanding it has been held that there is no jurisdiction to restrain a publication, whether libellous or not, merely because it may tend to injure property (3), it would seem to be the better opinion that it will interfere by injunction to stay any proceedings, whether connected with crime or not, which go to the immediate, or tend to the ultimate destruction or deterioration of property or a business, or make them less valuable or comfortable for use or occupation (4). But the Court will not interfere to restrain the publication of a libel where the statements complained of are not false as statements of facts, but only false as statements of deductions from principles, or statements of the results deduced from false principles; or while it is uncertain whether what is stated is false or true, and it is reasonably certain that there is no malice (5). Nor will the Court restrain the publication of a description of the character of property—for instance a ship—by a society of which the plaintiff is a member, where the society is accustomed to furnish to its members that information—and thus indirectly to the public—though that description may be injurious to the plaintiff by destroying the reputation of that property, in the particular trade in which it is employed; unless there be malice or improper conduct, or any improper motive actuating the defendant to injure the plaintiff (6). But a person complaining of a libel in a newspaper is, under the provisions of the 6 & 7 Will. 4, c. 76, s. 19, and the 32 & 33 Vict.

(1) *Prudential Assurance Co. v. Knott*, L. R. 10 Ch. 142; 44 L. J. (Ch.) 192; 23 W. R. 249; 31 L. T. (N. S.) 866.

(2) *Fisher v. Apollinaris Co.*, L. R. 10 Ch. 297, 302; 44 L. J. (Ch.) 100; 23 W. R. 460; 32 L. T. (N. S.) 628.

(3) *O'Grady v. Orr*, Ir. R. 10 Eq. 111.

(4) *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551; 37 L. J. (Ch.) 889; 16 W. R. 1138; 19 L. T. (N. S.) 64.

(5) *Mulkern v. Ward*, 13 W. R. 619, 622; 41 L. J. (Ch.) 464; 26 L. T. (N. S.) 831; L. R. 13 Eq. 619.

(6) *Clover v. Royden*, L. R. 17 Eq. 190, 203; 43 L. J. (Ch.) 665; 22 W. R. 254; 29 L. T. (N. S.) 639.

c. 24, entitled to a discovery from the printer and publisher of the name of the proprietor, for the purpose of bringing an action for damages sustained by reason of the libel (1).

3. The publication of a libel is a crime, and there is no jurisdiction in a Court of Equity to prevent the commission of crimes, excepting, of course, such cases as belong to the protection of infants, where a dealing with an infant might amount to a crime, an exception arising from that peculiar jurisdiction of the Court of Chancery (2). But the fact of libel being an indictable offence will not repel the right to the common defences in a civil action by the party injured, brought for damages; and the defendant in the action is entitled to the ordinary means, by a bill of discovery, of proving the truth of a plea of the matters in justification (3).

4. A Court of Equity will not restrain criminal proceedings, where the object sought is punishment for a criminal offence, though taken by a party who is seeking to obtain relief in Equity against the same parties, in respect of the same subject matter. But there is no doubt that there have been cases in which the object of criminal proceedings taken by a party to a suit in the Court of Chancery, has been so identical with the civil remedy, that that Court has thought it right to order that the party should not pursue his remedy in both Courts (4). The Court will not restrain a public body—for instance a local Board—from taking steps by way of criminal proceedings which it is authorized by statute to take, to recover penalties by reason of the violation of provisions in that statute; it is a criminal proceeding, and as a general rule, there can be no right to restrain a criminal proceeding (5).

5. It is well established by authority that the Court of Chancery has originally no jurisdiction whatever to enjoin or regulate the proceedings upon an indictment (6). Nor has it jurisdiction to

(1) *Dixon v. Enoch*, L. R. 13 Eq. 394; 20 W. R. 459; 26 L. T. (N. S.) 127.

(2) *Gee v. Pritchard*, 2 Sw. 413; *Anon.*, 2 Atk. 469.

(3) *Macaulay v. Shackell*, 1 Bli. (N. S.) 96; *vide Shackell v. Macaulay*, 3 L. J. (N. S.) Ch. 40.

(4) *Saull v. Browne*, 23 W. R. 50; L. R. 10 Ch. 64; 44 L. J. (Ch.) 1; 31 L. T. (N. S.) 493.

(5) *Kerr v. Mayor, &c., of Preston*, 25 W. R. 265.

(6) *Att.-Gen. v. Cleaver*, 18 Ves. 220.

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restrain quasi-criminal proceedings on the part of the municipal authorities of a city, for repeated violations of an alleged invalid ordinance (1). But circumstances may give a Court of Chancery jurisdiction to enjoin or regulate the proceedings upon an indictment—as for instance where the relators in an information are the persons prosecuting the indictment, the Court would have control by order personally affecting them (2). So the Court will stay proceedings in an indictment for trespass, where bills have been filed in Chancery by the plaintiff and defendant to try their right to the property in question (3).

(1) *Williams v. Detroit*, 2 Mich. 560 (2) *Att.-Gen. v. Cleaver*, 18 Ves.
(Amr.). 220.

(3) *Pilkington v. City of York*, Dick. 84.

CHAPTER V.

THE DOCTRINES AND PRINCIPLES AS APPLICABLE TO
CORPORATIONS AND QUASI CORPORATIONS.SECT. 1. *Municipal Corporations—Corporations Aggregate.*

PART II.

1. A suit against a corporation to enforce public trusts must be filed by the Attorney-General, and not by an individual member of the corporation, though he allege himself entitled to a separate benefit; and if a burgess claims an individual right in a part of the corporate estate—for instance a right of pasturage—it must be considered as made in his corporate, and not in his individual capacity; and if particular lands of the corporation have been sold, in which a burgess claims such a right of pasturage, no distinct claim can be made by the burgess individually, for compensation out of the unsold property of the corporation (1). The Attorney-General may maintain a suit to restrain the alienation of corporate property pending the granting of a charter, and may also maintain a suit to recover the property after the charter is granted (2). The Court will not inquire into the validity of a charter, but will act upon it as being valid, until proper proceedings are taken to set it aside (3).

Municipal corporations.

2. Although a corporation may be entitled to grant leases of the corporate property—for instance a market-place—yet, if the rents are devoted to the maintenance of the property, it is not entitled to demise the property at diminished rents upon payment of fines (4).

3. Although where persons have special powers conferred on them by Parliament for effecting a particular purpose, they cannot

(1) *Evan v. Corporation of Avon*, (Ch.) 172.)
29 Beav. 144; 30 L. J. (Ch.) 165. (3) *Ib.*

(2) *Att.-Gen. v. Avon (Portreeve)*, (4) *Att.-Gen. v. Avon*, otherwise
&c.), 9 Jur. (N. S.) 1117; 11 W. R. *Aberavon (Portreeve, &c.)*, 3 De G. J.
709. (See this case on appeal, 33 L. J. & S. 637.

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be allowed to exercise those powers for any purpose of a collateral kind; and therefore, a company authorized (making due compensation) to take compulsorily the lands of any person for a definite object, may be restrained from attempting to take them for another object; yet the case is different where an existing public body, such as the corporation of a city, is entrusted by the Legislature with the duty of making public improvements in its city; the powers thus entrusted to it for such a purpose will not be subject, as in the other case, to a strict and restrictive construction (1). The cases which decide that a railway company cannot take compulsorily more land than is actually required for its works, do not apply to a corporation taking lands for public improvements, and a corporation is entitled to take compulsorily all the lands comprised in its notice to treat, though they are more than actually required for its works (2).

4. Where persons are appointed by an Act of Parliament to perform a public office—as for instance to keep up the navigation of a river—they have, *primâ facie*, the first right to be judges as to what is necessary to enable them to perform that office, being a public body entrusted with powers and duties for a public purpose; and a Court of Equity gives, in the first instance, credit to them as being the best judges of what they want, assuming that they are actuated by no other object than that of doing their duty (3).

5. A Court of Equity will restrain a corporation from permitting corporate land to be used for any other purpose than that to which it has been dedicated by an Act—as for instance from permitting a cattle-fair to be held on land directed by an Act to be kept in proper condition for the purpose of public recreation (4).

6. A Court of Equity will restrain the town council of a borough from acting upon a notice duly given—for instance, as to building in a certain line—where they have already permitted the party served to act upon a plan approved by their committee (5).

(1) *Galloway v. City of London*,
L. R. 1 H. L. 34; 10 Jur. (N. S.) 552;
12 W. R. 891; 10 L. T. (N. S.) 439.

(2) *Quinton v. Bristol (Mayor, &c.)*,
43 L. J. (Ch.) 783; 22 W. R. 434;
L. R. 17 Eq. 524; 30 L. T. (N. S.)
112.

(3) *Att.-Gen. v. Great Eastern
Railw. Co.*, L. R. 6 Ch. 572; 19 W. R.
788.

(4) *Attorney-General v. Southamp-
ton (Mayor, &c.)*, 2 Giff. 363.

(5) *Slee v. Bradford (Mayor, &c.)*,
4 Giff. 262; 9 Jur. (N. S.) 815.

So it will restrain a corporation from exercising powers given to it by statute—for instance a power of prescribing a line of building—where it has lain by until the line has been passed by a building (1).

7. A Court of Equity will restrain the application of rates, leviable by a municipal corporation for certain purposes, to any other purpose (2). The borough fund is a trust fund, and is so constituted by the Municipal Corporations Act (5 & 6 Will. 4, c. 76), and the Court will restrain its expenditure upon any other purpose than that to which it is legally applicable (3). As for instance, the application of borough funds towards the expenses of obtaining an Act for purposes to which the funds are not applicable (4). And the Court has authority and jurisdiction to compel the parties who receive and apply the fund, to account for the sums they receive, and their application (5). And, if expedient, to restrain the misapplication of the fund (6).

8. A city corporation is in the nature of a trustee of the money in its treasury for the corporators, for the purposes for which they were incorporated, and a Court of Equity will restrain a meditated misappropriation of the trust fund; and even if an action could be maintained for the misappropriation, or for the purpose of resisting the collection of the tax intended to be misappropriated, still it is clear that it is not necessary to wait until the money is misappropriated, nor until the tax shall be levied and attempted to be collected, but a Court of Equity will interpose by way of preventing the injury (7). So the Court of Chancery has jurisdiction to prevent the town council of a borough from abusing a power given to them by the Municipal Reform Act, 1836 (5 & 6 Will. 4,

(1) *Folkstone (Corporation of) v. Woodward*, 21 W. R. 97; L. R. 15 Eq. 159; 42 L. J. (Ch.) 782; 27 L. T. (N. S.) 574.

(2) *Dublin (Corporation of) v. Att.-Gen.*, 9 Bligh, 395; 3 Cl. & F. 289; *Att.-Gen. v. Corporation of Dublin*, 2 Hag. 257.

(3) *Att.-Gen. v. Corporation of Norwich*, 16 Sim. 275; 21 L. J. (N. S.) Ch. 139.

(4) *Att.-Gen. v. Corporation of*

Norwich, *supra*, *Att.-Gen. v. Mayor, &c., of Waterford*, 1 R. 9 Eq. 522.

(5) *Att.-Gen. v. Corporation of Lichfield*, 11 Beav. 120; *et vide Att.-Gen. v. Corporation of Norwich*, *ante.*; *Att.-Gen. v. Aspinall*, 2 My. & Cr. 613.

(6) *Ib.*, *et vide Att.-Gen. v. Mayor, &c., of Liverpool*, 1 My. & Cr. 171.

(7) *New London v. Brainard*, 22 Conn. 552-6 (Amr.); *et vide Att.-Gen. v. Cohoes Co.*, 6 Paige, 133 (Amr.).

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Corporations
aggregate.

c. 76) (1). But a Court of Equity ought not to interfere in the ordinary management of the borough fund (2). And if a corporation has the power of doing or not doing an act at their discretion, Equity will not interfere with the lawful exercise of the discretion, however injurious its consequences, unless it infer fraud (3). An injunction will issue to restrain a city from taking private property without legal right (4), or where it has not the power necessary to enable it to raise, within a reasonable time, a sufficient sum to pay for the damages caused by such intended taking, unless security for payment be given (5).

9. Persons constituting a public body, interfering with the property of individuals by virtue of an Act of Parliament, are strictly tied down to the limits of the powers given by the Act, and they are bound to shew clearly and distinctly that they are empowered by the Act to do what they propose to do. And a public body exceeding its powers will be restrained by injunction (6). Thus the Court will restrain corporations aggregate from taking compulsorily more property for the purposes of the Acts under which they are proceeding, than they have formally adjudged necessary for those purposes (7). So they will be restrained from constructing works beyond the powers of their charters (8); or from disposing of the corporate property for other than corporate purposes (9); or from making a lease illegally (10); or from violating the provisions of a statute applicable to themselves (11). or of their charters (12); or from applying moneys produced by rates towards any objects other than those authorized by their

(1) *Parr v. Att.-Gen.*, 8 Cl. & F. 409; *Att.-Gen. v. Corporation of Poole*, 4 My. & Cr. 17.

(2) *Att.-Gen. v. Corporation of Norwich*, 1 Keen, 700; 2 My. & Cr. 406.

(3) *Semmes v. Columbus*, 19 Geo. 471 (Amr.).

(4) *Lumsden v. Milwaukee*, 8 Wis. 485 (Amr.).

(5) *Keene v. Bristol*, 26 Penn. 46 (Amr.).

(6) *Oldaker v. Hunt*, 19 Beav. 485; 6 De G. M. & G. 376; *et vide Att.-*

Gen. v. Andrews, 2 Mac. & G. 225; 2 H. & T. 431.

(7) *Thomas v. Daw*, L. R. 2 Ch. 1; 36 L. J. (Ch.) 201.

(8) *Newark v. Elmer*, 1 Stockt. 745 (Amr.).

(9) *Kean v. Johnson*, 1 Stockt. 401 (Amr.).

(10) *People v. New York*, 32 Barb. 102 (Amr.).

(11) *Com. v. Bank, &c.*, 4 Allen, 1 (Amr.).

(12) *Manderson v. Commercial, &c.*, 28 Penn. 379 (Amr.).

powers (1); or from applying such moneys towards an object within their powers, where they have attempted to effect that object in a manner contrary to their corporate statutory powers (2). A company will be restrained from applying the moneys subscribed for its capital, to the purpose of buying up shares of the company, unless in the manner prescribed by its corporate powers or by statute (3).

10. A Court of Equity will decide upon the existence and the extent of the powers possessed by corporations aggregate; but, if it is satisfied that they are not exceeding their powers, it will not interfere by injunction (4). But it will not allow such bodies to repay to themselves the costs of unfair and inequitable applications to the Legislature, out of the funds of the body they represent (5); or of improper applications (6). Where there is a doubt whether the arbitrary powers given to local boards are properly exercised, it is the duty of a Court of Equity to take care that the checks appointed by the Legislature have due operation in favour of the persons affected, and therefore it will restrain a local board of works, which has exceeded its statutory powers, and has attempted to exercise arbitrary powers without leaving to a person affected thereby the right of appeal given by the Act, from so doing, until the question shall have been determined by the proper tribunal (7). The Court will not allow corporations aggregate to act arbitrarily in the exercise of their powers, by attempting to procure the performance of acts which they have no power to enforce (8). Nor will such bodies be allowed to extend the exercise of their powers beyond the par-

(1) *Att.-Gen. v. West Hartlepool Improvement Commissioners*, L. R. 10 Eq. 152; 22 L. T. (N. S.) 510; 39 L. J. (Ch.) 624; 18 W. R. 685.

(2) *Att.-Gen. v. Kingston Commissioners*, 7 Ir. R. Eq. 383.

(3) *Hope v. The International Financial Society*, 25 W. R. 67, 203; vide "The Companies Act, 1867," 30 & 31 Vict. c. 131.

(4) *North London Railw. Co. v. Metropolitan Board of Works*, *Winter v. Same*, 1 Joh. 405; *Salmon v. Randall*, 3 My. & Cr. 439; *Temple Pier Co. v. Metropolitan Board of Works*, 34

L. J. (N. S.) Ch. 262; 13 W. R. 535; *Imperial Gas Light and Coke Co. v. West London Junction Gas Co. and Great Western Railw. Co.*, 14 W. R. 1019.

(5) *Att.-Gen. v. Guardians of the Poor of Southampton*, 17 Sim. 6; 18 L. J. (Ch.) 393; 13 Jur. 669.

(6) *Mathias v. Wilts and Berks Canal Navigation Co.*, 34 L. T. 346.

(7) *Tinkler v. Wandsworth District Board of Works*, 1 Giff. 412; 2 De G. & J. 261; 3 Jur. (N. S.) 1292; 4 Jur. (N. S.) 293.

(8) *Clarke v. Paddington Vestry*, 5 Jur. (N. S.) 133.

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tical area of their jurisdiction, except in those cases where they are authorized to do so (1). However, if such bodies do not exercise the discretionary powers the Legislature has given them, capriciously, the Court will not interfere (2). But public works ordered by Act of Parliament to be carried out by a corporation aggregate, must be so executed as not to interfere with the private rights of individuals; and in deciding on the right of a single proprietor to an injunction to restrain such interference, the circumstance that a vast population will be injured—as for instance by a district remaining undrained—unless his rights are invaded, is one which a Court of Equity cannot take into consideration (3). If a corporation aggregate produces injury to a party in respect of his private rights, by the unskilful or improper construction of the works it is authorized by the Legislature to construct, the Court will interfere to prevent the injury, and if necessary, to enforce a proper mode of constructing the works (4). If such bodies give notices for dealing with property, which are invalid, as being in cases not within their Acts, a Court of Equity will restrain them from proceeding on their notices (5). So if they are proceeding to execute works to the injury of property in a case not within their Act, a Court of Equity, unless expressly excluded, has jurisdiction to interfere; although by the Acts of Parliament of such bodies, jurisdiction is given to another forum—as for instance to justices at sessions, and judgment is not to be removed by a *certiorari*, or otherwise, into any of her Majesty's Courts of Record at Westminster or elsewhere (6).

11. A Court of Equity has jurisdiction to restrain such corporations from paying money secured by their bonds, to a person who has wrongfully obtained possession of them, or to any other person than the lawful owner of them (7).

12. It is a principle of jurisprudence that the governing body

(1) *Hayward v. Lowndes*, 28 L. J. (Ch.) 400; 4 Drew. 454.

(2) *Austin v. St. Mary, Lambeth (Festry)*, 4 Jur. (N. S.) 274, 1032; 26 L. J. (Ch.) 677.

(3) *Att.-Gen. v. Birmingham (Borough Council)*, 4 K. & J. 528.

(4) *Statuton v. Woolrych*, 23 Beav.

225; 3 Jur. (N. S.) 257; 26 L. J. (Ch.) 300.

(5) *Sims v. Estate Co.*, 14 W. R. 419; 14 L. T. (N. S.) 55.

(6) *Birley v. Constables of Chorley-upon-Medlock*, 3 Beav. 499; *vile Ker-rison v. Sparrow*, 19 Ves. 449.

(7) *Glass v. Marshall*, 15 Sim. 71.

of a corporation, that is in fact a trading partnership, cannot, in general, use the funds of the community for any purpose other than those for which they were contributed. By the governing body is not meant exclusively either directors or a general council, but the ultimate authority within the society itself, which is ordinarily a majority at a general meeting. According to this principle, the special powers given either to the directors or to a majority by the statutes or other constituent documents of an association, however absolute in terms, are always to be construed as subject to a paramount and inherent restriction that they are to be exercised in subjection to the special purposes of the original bond of association. This is not a mere canon of English municipal law, but a great and broad principle which must be taken, in absence of proof to the contrary, as part of any given system of jurisprudence; though possibly in this or that system the line may be drawn more or less sharply by decisions (1).

SECT. 2. *Quasi Corporations Aggregate.*

1. A Court of Equity will, upon a bill for a dissolution, restrain the representatives of a *quasi* corporation aggregate, for instance the committee and trustees of a friendly society founded on rules framed on erroneous principles, from making payments under the rules, tending to exhaust its funds (2).

2. Although a Court of Equity will not interfere with any public duty which a public *quasi* corporation aggregate—as, for instance, the Lords of the Treasury—have to discharge, or with any discretion which they have to exercise in their public capacity, yet it will restrain them from doing a mere ministerial act—such as the payment of compensation money awarded for the abolition of an office—with a view to secure the money for the parties who may be decreed to be entitled to it (3). So it will restrain a vestry from demolishing a building alleged to have been built in violation of a Building Act, where the vestry has lost all right to

(1) *Pickering v. Stephenson*, L. R. 14 Eq. 322, 340; 41 L. J. (Ch.) 493; 20 W. R. 654; 26 L. T. (N. S.) 608. (2) *Reeve v. Parkins*, 2 Jac. & W. 390. (3) *Ellis v. Earl Grey*, 6 Sim. 214.

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object to the building, through neglecting to act within the time authorized, or from proceeding on a summons issued to the wrong person (1). So the Court will restrain a district board of works from demolishing houses where such an act is *ultra vires* (2). So it will restrain a local board of health acting under statutory powers (Public Health Act 1848, 11 & 12 Vict. c. 63) from making improvements—for instance, in a road—in such a manner as to be unnecessarily injurious to the plaintiff (3); or where a local board acting under statutory powers over sewers, in the exercise of those powers, commits a nuisance (4).

3. The Court will restrain guardians of the poor from committing a trespass upon land, in respect of which they wrongfully claim a right of way to their relieving office, causing serious injury to the plaintiff (5). And in considering the injury, the possible as well as the actual use of the injured premises will be regarded (6). But a Court of Equity has not authority to interfere in favour of *quasi* corporations aggregate—as, for instance, trustees of a turnpike road—with the rights of property, to the extent of protecting them from a future contingency only (7).

4. The Court will restrain the vestrymen of a parish from applying the produce of one class of rates, to objects for which they are empowered to raise another class of rates, or from making good the deficiencies of any one of the rates out of the produce of the other rates. It is in the power of the vestry to borrow on the security of any particular rate, but it cannot pledge any other rates as a security, that is to say, it cannot borrow in aid of one rate on the security of another (8). So a local board of health, which has misapplied rates towards defraying the expenses of a bill in Parliament, will be restrained from further prosecution of the bill (9).

(1) *Brutton v. Parish of St. George's, Hanover Square*, 20 W. R. 84; 25 L. T. (N. S.) 552; 41 L. J. (Ch.) 134; L. R. 13 Eq. 339.

(2) *Auckland (Lord) v. Westminster Local Board of Works*, 41 L. J. (Ch.) 723; L. R. 7 Ch. 597; 20 W. R. 845; 26 L. T. (N. S.) 961.

(3) *Milward v. Redditch Local Board of Health*, 21 W. R. 429.

(4) *Att.-Gen. v. Hackney Local Bd.*, L. R. 20 Eq. 626; 44 L. J. (Ch.) 545.

(5) *Ardley v. St. Pancras (Guardians)*, 39 L. J. (Ch.) 871.

(6) *Ib.*

(7) *Cunliffe v. Whalley*, 13 Beav. 411.

(8) *Att.-Gen. v. Daniell*, 4 Jur. 793, 790; 9 L. J. (N. S.) Ch. 394.

(9) *Att.-Gen. v. Tottenham Local Board of Health*, 27 L. T. (N. S.) 440.

5. If a member of a club is expelled in a manner authorized by the rules of the club, and the meetings called for the purpose of expelling the member have been fairly called, and the decision adopted *bonâ fide*, and not through any caprice, a Court of Equity will not interfere (1). And if the committee of a club have power to expel any member whose conduct is, in their opinion, injurious to the interests of the club, and they exercise this power, all the Court requires is that the committee should form their opinion in a *bonâ fide* way, and the question whether their opinion is just or unjust, is immaterial; in such a case there is no power in the Court to control the judgment or opinion of the committee, and the Court will not interfere to reinstate the expelled member (2). These clubs are formed entirely for social purposes, and there must be some paramount authority to keep up their objects. In some cases this Court will interfere with the exercise of that paramount authority, but only where there is a moral culpability, as, if the decision is arrived at from fraud, personal hostility, or bias. But in cases of this description all that the Court requires is to know that there was an honest exercise of judgment, it will not consider whether rightly or wrongly (3).

(1) *Hopkinson v. Marquis of Exeter*, 19 W. R. 256, L. R. 5 Eq. 63; 37 L. J. (Ch.) 173; *son-Gardner v. —*, 19 W. R. 256, 259; 24 L. T. (N. S.) 81; *Lyttleton v. Blackburn*, 33 L. T. (N. S.) 641.

(2) *Gardner v. Freemantle, Richard-*

(3) *Gardner v. Freemantle, supra.*

CHAPTER VI.

THE DOCTRINES AND PRINCIPLES AS APPLICABLE TO ECCLESIASTICAL MATTERS AND BURIAL GROUNDS.

PART II.

1. A Court of Equity will, upon applications for injunctions with respect to ecclesiastical trusts, if necessary, in order to enable it to ascertain who are the *cestuis que trust*, decide upon the doctrines of the particular church or religious community, and will interfere to prevent any breach of trust by acts in violation of those doctrines. Thus it will remove trustees who have concurred in breaches of the trust for any particular religious community (1). Whenever the trustees of a religious society, organized under a law of incorporation, do any act which obstructs the enjoyment of the property for the purposes and in the mode authorized by the usages of the church as an organized body, they are guilty of a violation of trust, which, as in other cases of trusts, will be corrected by a Court of Equity (2). The Court will restrain trustees of a chapel from electing as minister a person not eligible to act as such with reference to the tenets of the endowment (3). So it will decide upon the status of a minister and his qualification with regard to the trusts of the endowment to act as such, and will, if necessary, restrain him from so doing (4). So the Court will decide upon the claim of a person in orders to perform divine service in a chapel as rector of a parish, in respect of an office held by him as a layman (5). A dissenting minister placed

(1) *Drummond v. Att.-Gen.*, 2 H. L. C. 837; *Att.-Gen. v. Drummond*, 1 D. & War. 353; and see 3 D. & War. 165; 1 Con. & L. 210; 2 Id. 93; *Newsome v. Flowers*, 7 Jur. (N. S.) 1268; 31 L. J. (Ch.) 29.

(2) *Brunnenmeyer v. Bukre*, 32 Ill. 183; *Perry v. McEwen*, 22 Ind. 440

(Amr.).

(3) *Milligan v. Mitchell*, 1 My. & K. 446.

(4) *Att.-Gen. v. Murdoch*, 1 De G. M. & G. 86; 7 Hare, 445.

(5) *Att.-Gen. v. St. Cross Hospital*, 2 Jur. 336; 25 L. J. (Ch.) 202; 18 Beav. 601; 24 L. J. (Ch.) 148.

in possession of the chapel and dwelling-house by trustees is only their tenant at will, and if a trust of a public nature is created, it is essential to the purposes of the trusts that a majority of the trustees should have the power, both at Law and in Equity, of binding the minority, and the Court will restrain such a minister removed by a majority of the trustees from officiating, and the minority of the trustees from permitting him to do so (1). The Court will take care that the number of trustees in a trust to present to a living shall be properly filled up (2). So it has jurisdiction to decide upon the validity of an appointment by trustees, of a minister to a chapel (3). So it will restrain the trustees of an advowson from presenting to the bishop for induction, and the bishop from inducting a minister of a parish, where the right of electing the minister has been exercised by a body not having that right (4). If there are trusts apart from a charter of incorporation in favour of the pastor of a church, a Court of Equity has, notwithstanding the Crown may be visitor, jurisdiction to see to the performance of the trusts, and determine on the validity of a dismissal of the pastor, for the visitatorial power of the Crown, in such a case, only relates to corporate matters, and does not exclude the right of the Court to inquire whether the trusts have been properly discharged towards the pastor (5). Equity will restrain the use of a place of worship for any other religious worship than that of its foundation (6); and dissenting meeting-houses must continue devoted to the doctrines usually agreed on at the foundation of the trust (7); and the Court is unquestionably bound to administer trusts for the benefit of Protestant dissenting congregations, consisting in the application of trust property to the maintenance of a preacher to the congregation (8).

(1) *Perry v. Shipway*, 1 Giff. 1; (5) *Daugars v. Rivaz*, 28 Beav. 233;
4 De G. & J. 353; 7 W. R. 406; 8 W. R. 225; 6 Jur. (N. S.) 854;
5 Jur. (N. S.) 535, 1015. 29 L. J. (N. S.) 685.

(2) *Att.-Gen. v. Bishop of Lichfield*, (6) *Att.-Gen. v. Welsh*, 4 Hare,
5 Ves. 825. 572.

(3) *Att.-Gen. v. Lawson*, 15 W. R. (7) *Foley v. Wontner*, 2 Jac. & W.
100; 36 L. J. (Ch.) 130. 245, 247.

(4) *Carter v. Cromptley*, 8 De G. M. (8) *Att.-Gen. v. Pearson*, 3 Mer. 353,
& G. 680; 3 Jur. (N. S.) 171; 2 Jur. 396.
(N. S.) 1200.

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A Court of Equity will not aid a congregation to remove their minister where they, having a power to remove him at discretion, have exercised that power oppressively (1).

2. Although a Court of Equity has no jurisdiction to direct the restoration of the interior of a church—as by removing pews and substituting chairs—yet it will grant an injunction to restrain alterations of the walls or brickwork of the church without the authority of the archdeacon or bishop, on the undertaking of the plaintiff to apply to the proper Ecclesiastical Court for authority to restore the church to its original state (2).

3. On the principle of protecting property pending litigation, a Court of Equity will, in a suit to impeach a conveyance of an advowson, restrain the institution of a clerk by the bishop, until the question has been decided, even as against a defendant claiming to be a purchaser for valuable consideration without notice (3). So the Court will grant an injunction to restrain a bishop from inducting a party to a living, who is alleged to be a devisee in trust to present the plaintiff (4). An archbishop will be restrained from collating, by way of lapse, to a deanery, pending a suit in the proper Court, respecting the presentment by the chapter (5). So a bishop will be restrained from taking advantage of any lapse pending a suit (6).

4. A Court of Equity in a case of obstruction to the induction of a party to a benefice, will restrain by injunction all interference therewith (7).

5. If an agreement point particularly to making judgments in the hands of mortgagees of an advowson, the rector of which is also the patron of the living, charges on the living, a Court of Equity cannot, without giving its aid to simony, at the suit of the

(1) *Dean v. Bennett*, 19 W. R. 363; 18 W. R. 487; 24 L. T. (N. S.) 169; L. R. 6 Ch. 489; 40 L. J. (Ch.) 452; 19 W. R. 363.

(2) *Curdinall v. Molyneux*, 4 De G. F. & J. 117; 7 Jur. (N. S.) 854; 4 L. T. (N. S.) 605.

(3) *Greenslade v. Dare*, 17 Beav. 502

(4) *Potter v. Chapman*, Dick. 146, Amb. 98.

(5) *Daly v. Archbishop of Dublin*, Fl. & K. 263.

(6) *Nicholson v. Knapp*, 9 Sim. 326.

(7) *Jenkins, In re*, L. R. 2 P. C. 258; 38 L. J. (P. C.) 6; 19 L. T. (N. S.) 583; 17 W. R. 502.

first mortgagee, give effect to it, by granting an injunction and a receiver to restrain the other judgment creditors from recovering from a sequestrator, under a sequestration issued by puisne mortgagees, the money in the sequestrator's hands (1).

6. The Court will not grant an injunction to restrain a judgment creditor from proceeding in an action to recover his debt, under which he has obtained a judgment, in virtue of which the tithes and profits of a vicarage are sequestered; the matter is one exclusively for the Court of Common Law out of which the execution has issued (2).

7. The Court will restrain the enforcing of sequestrations by parties having annuities charged on rectories and a vicarage alleging themselves to be prior to the plaintiffs, also having such charges (3). So it will appoint a receiver at the instance of a second incumbrancer on a rectory, where a third incumbrancer has obtained a sequestration, and will ascertain the priorities of the incumbrancers, and direct the payment of what is due, according to the priorities (4).

8. A Court of Equity will stay the proceedings of a plaintiff, mortgagee of a manor with an advowson appendent pending a foreclosure suit, in a *quare impedit*, for the mortgagee can make no profit by presenting to the church, and the mortgagee, until a foreclosure, is but in the nature of a trustee for the mortgagor, and the mortgagor shall present unless foreclosed (5).

9. Immemorial use and occupation, coupled with reparation, entitle the lord of a manor by prescription, to the perpetual and exclusive use of a chancel appendant to a manor or manor-house, and the Court will not restrain actions for trespass to protect that right (6).

10. A Court of Equity has jurisdiction, at the suit of the churchwardens of a parish, to restrain a person from pulling down

(1) *Long v. Storie*, 3 De G. & Sm. 3 Sw. 109.

308. (5) *Amhurst v. Dawling*, 2 Vern.

(2) *Williams v. Ivimey*, 23 L. T. 401; *et vide Att.-Gen. v. Hesketh*, 2 Vern. 548.

(3) *Silver v. Bishop of Norwich*, (6) *Churton v. Frewen*, L. R. 2 Eq. 634; 12 Jur. (N. S.) 879; 35 L. J.

3 Sw. 112. (Ch.) 692; 14 L. T. (N. S.) 846.

(4) *White v. Bishop of Peterborough*,

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the churchyard wall, though in assertion of an alleged right of way, because though the churchwardens might not be able to maintain an action at Law for such trespass, they might have redress in the Ecclesiastical Court, and a Court of Equity ought, in such a case, to be ancillary to the Ecclesiastical Court, and to grant an injunction as in other cases where any act in the nature of waste is threatened or committed (1).

11. Persons who have purchased family graves in perpetuity, in a private burial ground attached to a dissenters' chapel closed by an order of the Queen in Council (2), are entitled to an injunction to restrain the trustees from removing, obliterating, or defacing the graves or gravestones, or monuments belonging to them, and from applying the ground to other purposes (3). So where land has been set apart as a burial ground, in which burial places graves and vaults have been purchased in perpetuity, a Court of Equity will restrain the holders of the legal estate, though claiming as mortgagees, from destroying or defacing the graves, or doing any act which may prevent future interments, or from applying the ground purchased to any other purposes than those of burial (4). If there has been a legal appropriation of ground, as a dedication of the land to public and pious uses within the doctrines of the Statute of Elizabeth relating to charities, a Court of Equity will restrain the dispossession of the trustees of the property, and the removal of the tombstones and graves (5). No action at Law would afford an adequate and complete remedy. Such a case is not one of a mere private trespass, but a public nuisance going to the irreparable injury of the congregation for whose sole use and benefit the land has been so laid out and dedicated. To permit such conduct would be to allow the property consecrated to their use by a perpetual servitude or easement to be taken from them, the sepulchres of the dead to be violated, the feelings of religion, and the sentiment of natural affection of the kindred and friends of the deceased to be wounded, and the memorials erected by piety

(1) *Marriott v. Tarpley*, 9 Sim. (N. S.) 1189; 25 L. J. (Ch.) 883; 26 L. J. (Ch.) 690.

(2) See 15 & 16 Vict. c. 85.

(4) *Ib.*

(3) *Moreland v. Richardson*, 22 Beav. 596; 2 Jur. (N. S.) 726; 3 Jur. 581, 584 (Amr.).

(5) *Beatty v. Kurtz*, 2 Pet. 566, 579,

or love to the memory of the good, to be removed, so as to leave no trace of the last home of their ancestry to those who may visit the spot in future generations. It cannot be that such acts are to be redressed by the ordinary process of Law. The remedy must be sought, if at all, in the protecting power of a Court of Chancery, operating by its injunction to preserve the repose of the ashes of the dead, and the religious sensibilities of the living (1).

(1) *Beatty v. Kurtz*, 2 Pet. 566, 579, 581, 584 (Amr.).

CHAPTER VII.

THE DOCTRINES AND PRINCIPLES AS APPLICABLE TO COMPANIES
(RAILWAY AND OTHER PUBLIC COMPANIES).

PART II.

SECT. 1. *Railway Companies.*

1. It is not settled to what extent, or subject to what particular limitations, the jurisdiction of a Court of Equity ought to be exercised in preventing or checking the erroneous conduct of corporations created by Act of Parliament for public purposes; but the classes of cases in which such a Court has often been called on to interfere are those which arise out of a combination of—first, acts in themselves illegal, considered as breaches of contract with the public; secondly, acts which are breaches of contract, express or implied, with the subscribers to the undertaking; and, thirdly, acts erroneous, or breaches of contract incapable of being rectified by the shareholders themselves, in the exercise of their own powers; and it is necessary in such cases, to distinguish between the duty of the governing body to the public and their duty to the shareholders (1).

2. Parties injured by the conduct of a railway company, in exceeding the powers conferred upon them by Act of Parliament, are entitled to the most effectual remedy within the power of a Court of Equity (2).

3. A Court of Equity will not construe the compulsory powers of a railway company so as to extend them beyond the express words, or the absolutely necessary implication, of their Act; it being the duty of the company to take care that the public understand, before the Act is passed, the extent of the compulsory powers which they require (3).

(1) *Browne v. Monmouthshire Railway and Canal Co.*, 13 Beav. 32.

(2) *Spencer v. London and Birmingham Railway Co.*, 1 Railw. Cas. 159.

(3) *Lamb v. North London Railway Co.*, L. R. 4 Ch. 522; 21 L. T. (N. S.) 98; 17 W. R. 746.

4. An agreement to withdraw or withhold opposition to a bill in Parliament is not illegal; and a Court of Equity will enforce a contract founded on such a consideration, and will restrain a railway company from violating provisions omitted from their bill, but by the projectors of the company agreed to be executed after the incorporation of the company (1). The question in such cases is, not whether there were any binding contract at Law, but whether a Court of Equity would permit a company to use their powers under their Act, in direct opposition to an arrangement made with a party prior to the Act, upon the faith of which the company were permitted to obtain such powers. If the company and the projectors cannot be identified, still if it is clear that the company succeed to, and are in possession of all that the projectors had before, they are entitled to all their rights and subject to all their liabilities. And if any one individually projects such a scheme, and in prosecution of it, enters into arrangements, and then sells and assigns all his interest in it to another, there will be no legal obligation between those who dealt with the original projector and such purchaser; but in a Court of Equity it is otherwise. And a company, standing in the place of the projectors, cannot repudiate arrangements into which such projectors have entered; they cannot exercise the powers given by Parliament to such projectors in their corporate capacity, and at the same time refuse to comply with those terms, upon the faith of which, all opposition to their obtaining such powers was withheld (2). An agreement by a landowner, being a peer of Parliament, for certain personal advantages—as, for instance, that all trains should stop at a particular station—in consideration of withdrawing his opposition to the bill of the projectors, and endeavouring to prevent the bill of a rival company from passing into Law, is legal, and will be enforced in Equity at the suit of the peer; and the Court will restrain a violation of the agreement (3). A company substituted by an arrangement

(1) *Edwards v. Grand Junction Railw. Co.*, 1 My. & Cr. 650; 7 Sim. 327; 6 L. J. (N. S.) Ch. 47.

(2) *Ib.*

(3) *Lindsey (Earl of) v. Great Northern Railw. Co.*, 10 Harv. 664, 679;

17 Jur. 522; 22 L. J. (Ch.) 995; *vide Simpson v. Lord Howden*, 1 Railw. Cas. 326, 338, 347; 1 Keen, 583; *Petre (Lord) v. Eastern Counties Railw. Co.*, 1 Railw. Cas. 462; *Edwards v. Grand Junction Railw. Co.*, 1 My. & Cr. 650.

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as a defendant to an action by a landowner, originally against the chairman of the provisional committee, for a violation of an agreement by him to take lands upon certain terms, in consideration of the landowner withdrawing his opposition in Parliament to the proposed bill; thereby adopts the agreement, and a Court of Equity will restrain the company from proceeding with their railway in default of performing the agreement (1). So the Court will restrain a railway company from assessing the value of land upon a notice to treat, if the committee of subscribers applying for the Act has agreed with a peer and landowner for the payment of a given sum before entering his land, in consideration of his withholding opposition to the bill (2).

5. Although a Court of Equity will, in a proper case, exercise its jurisdiction by injunction, touching proceeding in Parliament for a private bill, or a bill respecting property, yet it has no power to interfere to deprive a party of the right of applying to Parliament for a special law to supersede the laws of property by which he finds himself bound, whether arising from contract or otherwise (3). But although it is clear that a Court of Equity, by means of its jurisdiction *in personam*, has, in a proper case, power to restrain any persons from making an improper and unauthorized application to Parliament for a private Act, yet it is difficult to conceive or define what are the cases in which it would be proper for the Court to exercise that power; and in no case which has yet come before a Court of Equity has such an injunction been granted (4).

6. A Court of Equity will restrain a railway company from building in violation of a covenant, notwithstanding they, subsequently to entering into the covenant, obtain an Act empowering them to do that which would be a violation of the covenant (5).

(1) *Williams v. St. George's Harbour Co.*, 2 De G. & J. 547; 24 Beav. 339; 4 Jur. (N. S.) 1066; 27 L. J. (Ch.) 691.

(2) *Petre (Lord) v. Eastern Counties Railw. Co.*, 1 Railw. Cas. 462.

(3) *Heathcote v. North Staffordshire Railw. Co.*, 2 Mac. & G. 100; 2 H. & T. 382; 6 Railw. Cas. 358.

(4) *Hartridge, Ex parte, London, Chatham, and Dover Railw. Co., Ex parte*, 17 W. R. 946; 20 L. T. (N. S.), 718; *et vide Steele v. North Metropolitan Railw. Co.*, L. R. 2 Ch. 237.

(5) *Lloyd v. London, Chatham, and Dover Railw. Co.*, 11 Jur. (N. S.) 380; 2 De G. J. & S. 568, 579.

And such a covenant being a valid covenant at Law, if the other circumstances of the case be such that a Court of Equity would enforce the covenant independently of the particular public importance or public policy which attaches to the question, such a Court ought not to be prevented by considerations of public policy from proceeding to enforce it (1).

7. Although the conduct of a company is a violation of an undertaking entered into by them with the Court, there is no jurisdiction in the Court to restrain the company from further soliciting a bill in Parliament, which is, in effect, a violation of such undertaking; such a bill, when entertained by the House of Commons, becomes the proceeding of the Legislature, and not of the company (2).

8. The directors of a railway company are not justified in acting on an old resolution authorizing the issuing of shares, after the particular purpose for which the authority was given has ceased to be available; nor in issuing shares, supposing them to have the power, for the express purpose of creating votes to influence a coming general meeting; and a Court of Equity will restrain the issue. Such a question is not one of internal management of the company, but an attempt on the part of the directors to prevent such management from being legitimately carried on (3). So a railway company will be restrained from defraying the expenses of an application to Parliament, out of the assets of the company, and from issuing new shares purporting to be shares in the company, except for the purposes and under the powers of the existing Acts of the company (4).

9. If directors of a railway company, the borrowing powers of which have been fully exercised, procure advances on their own personal security, within the limits of the capital of the company, and apply the same in completion of the undertaking, and the company at a general meeting sanction these proceedings; a Court of Equity will not restrain the repayment of the amount advanced

(1) *Lloyd v. London, Chatham, and Dover Railw. Co.*, 11 Jur. (N. S.) 380; 2 De G. J. & S. 568, 579.

(2) *Att.-Gen. v. Manchester and Leeds Railw. Co.*, 1 Railw. Cas. 436.

(3) *Fraser v. Whalley, Gartside v. Whalley*, 2 H. & M. 10.

(4) *Vance v. East Lancashire Railw. Co.*, 3 K. & J. 50.

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by directors, out of the profits of the company, in priority to preference shareholders (1).

10. The issue (after exhausting their parliamentary powers) by a railway company of bonds known as Lloyd's—namely, an acknowledgment of a debt, and a covenant to pay at a future day—to a contractor for work done, and to persons supplying a parliamentary deposit for the purpose of obtaining an Act to enable the company to raise further share and loan capital, will not be restrained after the employment of the money *bonâ fide* and successfully for those purposes (2).

11. It is sufficient to entitle a railway company to take lands, if they are within the limits of deviation delineated on the plan; the particular works need not appear on the deposited plans (3). A Court of Equity will restrain a railway company from taking possession of land until a proper valuation has been made and a proper bond, under the 85th section of the Lands Clauses Consolidation Act, to secure the payment of the purchase-money or compensation has been given, or a jury has given its verdict and the money deposited (4).

12. If a railway company give notice to treat for the purchase of a portion of a piece of land, and the owner give a counter notice to take the whole, the Court will restrain the company from taking any proceedings to entitle themselves to a part of the premises without taking the whole (5).

13. So under sect. 92 of the Lands Clauses Consolidation Act (8 Vict. c. 18) a landlord shall not be compelled to sell a part of his house, if before the company began to exercise their compulsory powers, he gives them notice to take the whole (6). And if a

(1) *Ulster Railw. Co. v. Banbridge, Lisburn, and Belfast Railw. Co.*, 2 Ir. Rep. Eq. 190; 18 L. T. (N. S.) 91; 16 W. R. 598.

(2) *White v. Carmarthen and Cardigan Railw. Co.*, 1 H. & M. 786; 33 L. J. (Ch.) 93; 12 W. R. 68.

(3) *Wild v. South Western Railw. Co.*, 32 Beav. 321.

(4) *Cotter v. Metropolitan Railw. Co.*, 10 Jur. (N. S.) 1014; 12 W. R. 1021; *Sweetman v. Metropolitan Railw.*

Co., 1 H. & M. 543; *et vide Rogers v. Hull Dock Co.*, 10 Jur. (N. S.) 1245; 34 L. J. (Ch.) 165; 12 W. R. 1101; 13 W. R. 217.

(5) *Mason v. London, Chatham, and Dover Railway Co.*, L. R. 7 Eq. 546; 38 L. J. (Ch.) 371; 20 L. T. (N. S.) 773; *vide Alexander v. Crystal Palace Co.*, 30 Beav. 556; 31 L. J. (Ch.) 500; 8 Jur. (N. S.) 833.

(6) *Gardner v. Charing Cross Railw. Co.*, 2 J. & H. 248; 10 W. R. 120.

railway which has given notice to take a part of a house or factory, is required to take the whole, it will be restrained from taking possession of the part it requires, until it pays into the Bank, under sect. 85 of the same Act, the value of the whole, which it is required to take (1). If a company has given notice to take part of a manufactory, and is required to take the whole, it cannot escape from the necessity of so doing, by changing its plan (2). A Court of Equity will enforce a verbal agreement to take the whole of the property by a railway company which, previously to the agreement, gives notice to take part, and after the agreement, takes compulsory possession of the part, and will restrain the company from so doing, and compel it to take the whole (3). But it would seem that a landowner, part of whose house, within the meaning of 8 Vict. c. 18, s. 92, is taken by a railway company, cannot compel the company to take any portion beyond what it requires, less than the whole (4).

14. Compulsory powers to take land are given to railway companies, and must be exercised for the sole purpose of constructing the railway and works; therefore if a railway company endeavour, by means of their compulsory powers, to construct a road, so as to accomplish a subsidiary object, it will be restrained at the instance of the landowner whose property would be affected, though the proposed works are within the scope of its Act (5).

15. It is clear that when the Legislature authorizes a railway company to take for the purposes of their undertaking, any lands specially described in their Act, it constitutes them the sole judges as to whether they will or will not take those lands, provided they take them *bonâ fide*, with the object of using them for the purposes authorized by the Legislature, and not for any sinister or collateral purpose (6).

(1) *Giles v. London, Chatham, and Dover Railw. Co.*, 1 Dr. & Sm. 40; *Underwood v. Bedford and Cambridge Railw. Co.*, *Badson v. East Kent Railw. Co.*, 7 Jur. (N. S.) 941.

(2) *Sparrow v. Oxford, Worcester, and Wolverhampton Railw. Co.*, 2 De G. M. & G. 94.

(3) *Binney v. Hammersmith and City Railw. Co.*, 9 Jur. (N. S.) 773;

8 L. T. (N. S.) 161.

(4) *Pulling v. London, Chatham, and Dover Railw. Co.*, 10 Jur. (N. S.) 665; 33 L. J. (Ch.) 505.

(5) *Dodd v. Salisbury and Yeovil Railw. Co.*, 1 Giff. 158; 5 Jur. (N. S.) 782; 33 L. T. 311.

(6) *Stockton v. Darlington Railw. Co.*, 9 H. L. C. 246; 6 Jur. (N. S.) 1168; 8 W. R. 708.

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16. If a railway company has acquired a legal right to and possession of land, and has constructed their railway over the same under the provisions of their Act, a Court of Equity will restrain another railway company, to whom the Legislature has given power to purchase the same land for the purposes of their undertaking, from exercising such power pending the trial of the legal question of the effect of such conflicting powers (1).

17. If a railway company take possession of land under a misapprehension that a tenant for life is owner in fee, a Court of Equity will restrain the company from retaining possession of the land, until compensation has been made to every person having an interest in the lands; and that, although they have constructed the railway on the lands (2). It is conceived that it is contrary to the provisions of the Lands Clauses Consolidation Act, 1845, that a company should take possession of the land until it has settled with everybody, and not merely with the tenants (3). But if a railway company has given notice to a tenant at will in possession, apparently as owner, a purchaser of part of the land subsequently to the notice cannot obtain an injunction to restrain the company from continuing in possession; the purchaser in such a case had no interest in the property at the time of the notice, and is but the purchaser of an interest in the purchase-money, but is not entitled to an injunction (4).

18. When a railway company has given notice to take land for some object which is clearly within its compulsory powers, a Court of Equity will not interfere to restrain it, merely on the ground that it might obtain the same object in some other way, without taking the land (5).

19. A Court of Equity will not interfere with the possession of a company where they have given the usual notice to a lessee, and have obtained a conveyance from parties who claimed as owners of the property, but will direct an inquiry as to title of subsequent

(1) *Manchester, Sheffield, and Lincolnshire Railw. Co. v. Great Northern Railw. Co.*, 9 Hare, 284.

(2) *Perks v. Wycombe Railw. Co.*, 3 Giff. 662; 8 Jur. (N. S.) 1051.

(3) *Inge v. Birmingham, Wolverhampton, and Stour Valley Railw. Co.*,

3 De G. M. & G. 658.

(4) *Carnochan v. Norwich and Spalding Railw. Co.*, 26 Beav. 169.

(5) *Lamb v. North London Railw. Co.*, L. R. 4 Ch. 522; 21 L. T. (N. S.) 98; 17 W. R. 746.

new claimants (1). If a railway company has paid part of the purchase-money of land required by them it may take possession, and retain the balance until the vendor makes a good title; for the company, by this part payment, purchases the right of possession, and will not be restrained from retaining possession, nor ordered to pay the balance into Court (2). And if a railway company having constructed its railway without authority from the owner of the land, afterwards use it for several years—as for instance fifteen—with the knowledge of the owner, he will not be permitted to interfere with the possession; for after acquiescence on the one hand and undisturbed enjoyment on the other for several years, the possession will not be disturbed, but a proper compensation will be assessed and paid (3).

20. So the owner of land upon which a railway company empowered by Parliament are about to enter under their parliamentary powers, is not entitled to an interlocutory injunction to restrain them from so entering and taking proceedings in respect of his land under the powers of their Act, if, by his silence and conduct, he has permitted the company to carry on their works upon the supposition that they were entitled to enter on and take the land in question (4).

21. If a railway company put another railway company into possession, and allow that company to remain in possession for several years undisturbed, the first company will be restrained from disturbing the possession of the latter, though the stipulation (the consideration) has not been performed by the latter company (5).

22. A Court of Equity will restrain proceedings to assess compensation under the 68th section of the Lands Clauses Consolidation Act by some of the parties claiming an interest in the land, until the rights of all the parties claiming an interest have been ascertained and are no longer doubtful (6).

(1) *Alston v. Eastern Counties Railw Co.*, 1 Jur. (N. S.) 1009.

(2) *Capps v. Norwich and Spalding Railw. Co.*, 9 Jur. (N. S.) 365; 11 W. R. 657.

(3) *Mold v. Wheatcroft*, 27 Beav. 510.

(4) *Greenhalgh v. Manchester and Birmingham Railw. Co.*, 3 My. & Cr. 784; 9 Sim. 614.

(5) *Great Northern Railw. Co. v. Lancashire and Yorkshire Railw. Co.*, 1 Sm. & Giff. 181.

(6) *South Western Railw. Co. v.*

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23. There is no equity to restrain the owners of a railroad belonging to a private company, made over an owner's land, from using the railroad after it has been completed, where the possession of the land for the purpose of constructing the railroad has been obtained from a tenant in possession. What is claimed by the company in such a case is simply a right of way, and if they are not entitled to that right they are mere trespassers, and the owner has his proper remedy against the company as such (1).

24. Although a Court of Equity will restrain one tenant in common from the wilful destruction of the common property held by tenants in common, and enjoyed in conformity with the common rights of the tenants in common; yet, where a railroad company has obtained a lease from five out of six tenants in common, and has, contrary to the wishes of the remaining tenant in common, constructed a railroad on the property, the Court will interfere by injunction to prevent the dissenting tenant in common from damaging the buildings and railway (2).

25. A Court of Equity will restrain a railway company from taking any proceedings for obtaining possession of land in the possession of a receiver of the Court (3).

26. It is generally incumbent on a railway company seeking to avail themselves of the provisions of the 85th section of the Land Clauses Consolidation Act, 1845, to shew satisfactorily and clearly that they have fulfilled its conditions and complied with its requisitions, and if there is room for doubt, the landed proprietor should have the benefit of the doubt (4). And if the form of the bond under the 85th section of that Act is defective, or is for a less quantity of land than the lands comprised in the original notice of the company, the Court will restrain the company from entering upon any of the lands (5). And if a railway company,

Coward, 5 Railw. Cas 703; 1 H. & T. 377, n.; *et vide Norwich Railw. Co. v. Woodhouse*, 11 Beav. 382; S. C. *sub nom. Norfolk Railw. Co. v. Bayes*, 13 Jur. 435.

(1) *Deere v. Gust*, 1 Myl. & Cr. 516.

(2) *Durham and Sunderland Railw. Co. v. Wawn*, 3 Beav. 119.

(3) *Tink v. Rundle*, 10 Beav. 318.

(4) *Barker v. North Staffordshire Railw. Co.*, 2 De G. & Sm. 55; 5 Railw. Cas. 412; 12 Jur. 324, 575, 589.

(5) *Barker v. North Staffordshire Railw. Co.*, *supra*; *et vide Poynder v. Great Northern Railw. Co.*, 2 Ph. 330; 5 Railw. Cas. 196, 201; 16 Sim. 3.

having served notice to treat with the owner of land under 8 Vict. c. 18, has been furnished with the title and a claim of a given sum as compensation, obtain possession from the occupying tenant, and commence the works, without paying the money or lodging it in Court, and giving the security required by the Act, the Court will grant an injunction against the company's proceeding with the works, and to compel it to restore the land to its former condition, unless the company undertake to lodge the sum claimed and give the bond required (1).

27. When the power of fully completing a railway, according to the intention of the Legislature, depends on the voluntary consent of individuals having property on the proposed line, such consent ought to be obtained by the company before they proceed in the undertaking (2). If the promoters of a railway company previously to obtaining the Act of the company have agreed with the lessees of houses and wharves upon the property purchased by the promoters from their lessors, to give them compensation for the value of their leasehold interests, or for damage sustained by them in respect of fixtures and improvements, or otherwise by the execution of the Act, on the lessees giving notice within a limited time, and the company give the lessees notice to determine their tenancies, the Court will not permit the company to exercise their legal rights on the face of such an agreement; and will, upon such notice by the lessees to sell, restrain an act of ejectment by the company until the amount of the purchase-money is ascertained and paid; for upon the moment of that notice the relation of vendor and purchaser commenced between the lessees and the company (3).

28. A company treating with a mortgagor alone, with notice of the mortgage, will be restrained from proceeding with their works until the value of the mortgagee's interest has been ascertained and paid, or secured (4).

29. Notice given to a landowner by a railway company of their

(1) *Armstrong v. Waterford and Limerick Railw. Co.*, 10 Ir. Eq. Rep. 60.

(2) *Gray v. Liverpool and Bury Railw. Co.*, 9 Beav. 391; 1 Railw. Cas. 235.

(3) *Doo v. Croydon Railw. Co.*, 1 Railw. Cas. 257; 8 L. J. (N. S.) Ch. 200; 3 Jur. 258.

(4) *Ranken v. East and West India Docks and Birmingham Junction Railw. Co.*, 12 Beav. 298.

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intention to summon a jury, does not render it inequitable for them to proceed in the meantime, under the 8 Vict. c. 18, s. 85, to obtain possession (1).

30. If, before the amount to be paid by a railway company for land required by them for the purposes of their railway has been determined, a verbal consent, whether qualified or general, has been given, whereupon the company has entered upon the land and has commenced works which permanently affect it; a Court of Equity will not interfere by injunction to stop the works, if perfect justice can be done by compelling the company to pay for the land (2).

31. Though a railway company has entered lands without notice or permission, yet if it appear that there had been a disposition to treat on the part of the owner, and that the steps taken were necessary for the public safety; on the company undertaking to pay into Court the probable value of the land taken, it will not grant an injunction against the company (3). A subsequent treating with a railway company will be considered by a Court of Equity as a waiver of objections to proceedings, the subject of the treaty, although such proceedings be not, in fact, authorized by the Railway Act (4).

32. If a railway company acting *boná fide* has made a mistake as to the lands they have valued and taken possession of, and the question between the company and the landowner is merely one of value, a Court of Equity will not grant an injunction to stay the works on the property taken; in such cases the Court has regard to the injury which may be done to the public (5).

33. The owner of a small part of land, the rest of which has been taken by a railway company, is entitled to an injunction to restrain the disturbance by the company of his possession, into which he has been put in an action of ejectment by him against the company (6). The defendants still continuing to run their

(1) *Langham v. Great Northern Railw. Co.*, 1 De G. & Sm. 486; 5 Railw. Cas. 269.

(2) *Langford v. Brighton, Lewes, and Hastings Railw. Co.*, 4 Railw. Cas. 69; see also *Cromford Canal Co. v. Cutts*, 4 Railw. Cas. 442.

(3) *Tower v. Eastern Counties*

Railw. Co., 3 Railw. Cas. 374.

(4) *Ib.*

(5) *Wood v. Charing Cross Railw. Co.*, 33 Beav. 290.

(6) *Stretton v. Great Western and Brentford Railw. Co.*, L. R. 5 Ch. 751; 18 W. R. 1078; 23 L. T. (N. S.) 379; 40 L. J. (Ch.) 50.

trains over the land, by such conduct sets all law at defiance. Of course, in such cases, an injunction as to the user of a railway is a serious matter. But with regard to public interests, the Court is not inclined to listen to any suggestions of public interest as against private rights acquired in a lawful manner; nor does it think that the interest of the public in using something that is provided for their convenience, is to be upheld at the price of saying that property is to be confiscated for that purpose. A man who comes to a Court of Equity is entitled to have his rights ascertained and enforced, however inconvenient it may be to third persons, to whom the use of his property may be very convenient (1).

34. A Court of Equity has not jurisdiction to decree the specific performance of a contract, for which the consideration on the part of the plaintiff, is the execution of certain works which the Court is unable to superintend (2); and therefore, in such a case, it will not restrain a railway company from permitting any other person except the plaintiff from constructing the railway (3). So if an agreement involve personal service, and as such, is one of which the Court will not grant a decree for specific performance, it will not interfere by injunction to restrain a company from determining the agreement (4). The power given to a Court of Law by the 17 & 18 Vict. c. 31 ("The Railway and Canal Traffic Act") (5), to grant a preventive remedy, does not, by giving a concurrent jurisdiction, abridge the jurisdiction of the Court of Chancery; and that Court will, notwithstanding that Act, entertain a bill to enforce the performance of an agreement as to the carriage of goods (6).

(1) *Stretton v. Great Western and Bradford Railw. Co.*, L. R. 5 Ch. 751; 18 W. R. 1078; 23 L. T. (N. S.) 379; 40 L. J. Ch. 50.

(2) *Peto v. Brighton, Uckfield, and Tunbridge Wells Railw. Co.*, 1 H. & M. 468; 32 L. J. (Ch.) 677.

(3) *Ib.*

(4) *Horne v. London and North Western Railw. Co.*, 10 W. R. 170; *et vide Chaplin v. North Western Railw.*

Co., 5 L. T. (N. S.) 601.

(5) "The Regulation of Railways Act, 1873" (36 & 37 Vict. c. 48), transfers to the Commissioners appointed thereby, the jurisdiction conferred upon certain Courts by the 17 & 18 Vict. c. 31.

(6) *Baxendale v. West Midland Railw. Co.*, 3 Giff. 650; 7 L. T. (N. S.) 297.

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35. A Court of Equity will interfere by mandatory injunction to compel specific performance of a contract against a railway company, though works (at variance with the agreement) are already erected; and the company cannot set up the inconvenience to the public by interference with the traffic (1).

36. Where the Court considers that time has originally been made of the essence of a contract or special agreement for making crossings, and there is no sufficient evidence of any agreement to enlarge the time, or that it has been waived by the conduct of the agents of the company, it will refuse specific performance of the works (2). And if the parties also agreed to leave matters to the discretion of the surveyor of the landowner, the Court has no power to substitute its own discretion for that of the surveyor, so as to order the construction of works, though such might appear to be necessary and proper (3). And where a person has made a special agreement as to crossings on a line of railway running through his land, if, from particular circumstances, that agreement is not carried into effect, he cannot, on the ground of any general rights, claim to have any other crossings made according to the discretion of the Court; for that would be to get the Court to substitute a new agreement, not to enforce the performance of the original; nor can a person who has made a special agreement as to crossings on a line of railway, and who, from particular circumstances, allows that agreement to fall through, afterwards set up general rights under the Railway Acts to have other crossings made (4).

37. If a railway company, the promoters of which have entered into an agreement to purchase, proceed under their Act, under the compulsory powers of the Lands Clauses Consolidation Act, they have, by resorting to the remedies under that Act, although the agreement might have been binding on the owner of the land, waived their remedy for specific performance; and the Court will

(1) *Raphael v. Thames Valley Railw. Co.*, L. R. 2 Ch. 147; L. R. 2 Eq. 37; 12 Jur. (N. S.) 656; 35 L. J. (Ch.) 659; 36 L. J. (Ch.) 209; 15 W. R. 322.

Chatham, and Dover Railw. Co., 9 Jur. (N. S.) 148; 33 L. J. (Ch.) 9.

(3) *Darnley v. London, Chatham, and Dover Railw. Co.*, 11 Jur. (N. S.) 520; L. R. 2 H. L. 43.

(2) *Darnley (Earl) v. London*, (4) *Ib.*

not grant an injunction to restrain the owner from taking proceedings under that Act, for assessing the value except upon the footing of the agreement (1).

38. If a railway company which has agreed to take certain lands at a specific sum for compensation, is let into possession, and has constructed its line over the lands, giving a bond for payment of the purchase-money on a future day, make default in payment of the bond, the landowner is not, upon his suit for specific performance, entitled to an injunction to restrain the company from continuing in possession of the land until they shall have paid the purchase-money; if the company were destroying the property, the plaintiff might be entitled to an injunction, but the fact that the plaintiff has let the company into possession and that they are only using the lands for the very purpose for which he sold it to them, disentitles him to the injunction. It appears inconsistent in a suit for specific performance to apply to turn the purchaser out of possession, and it would seem more proper, in such a case as this, to apply to have the money paid into Court (2). However, if a railway company take land and make a railway thereon and afterwards lease the railway to another company, and part of the purchase-money remain unpaid, a Court of Equity will, upon a bill asking that relief, order the first company to pay the money, and in default, that both companies shall be restrained from running engines over or otherwise using the plaintiff's land (3).

39. A Court of Equity will enforce specific performance of an indefinite agreement for the user of a railway by an individual on reasonable terms, where the actual user has removed all difficulty about what terms are reasonable (4).

40. A Court of Equity will not enforce specific performance of an agreement by a director with his company for the benefit of himself or his firm (5).

41. Although it is very difficult to execute an agreement by a

(1) *Bedford and Cambridge Railw. Co. v. Stanley*, 11 W. R. 139; 7 L. T. (N. S.) 477. L. R. 1 Ch. 594; 36 L. J. (Ch.) 104; 14 W. R. 1002.

(2) *Pell v. Northampton and Banbury Junction Railw. Co.*, L. R. 2 Ch. 100; 12 Jur. (N. S.) 897. (4) *Laird v. Birkenhead Railw. Co.*, Joh. 500.

(5) *Flanagan v. Great Western Railw. Co.*, L. R. 7 Eq. 116; 38 L. J. (Ch.) 117; 19 L. T. (N. S.) 345.

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railway company to purchase a portion of land necessary for their railroad "subject to making such roadways and slips for cattle as might be necessary," yet a plaintiff is entitled to a specific performance; and the Court will direct a reference to ascertain what is necessary (1).

42. Though where, on the footing of an offer, possession of land has been taken by a railway company which is undisturbed by the landowner until after an expenditure on the faith of such offer, the Court, on the principle of contract, will protect possession, and strain its discretionary jurisdiction of specific performance so far as to fix the amount of a rent not expressly or further fixed by the terms of the offer, than by an indication of the terms and principle on which the amount of rent is to be ascertained; yet if the plaintiffs have obtained from the Legislature the means for protecting their possession, the necessity for straining the doctrine of specific performance is at an end, and the Court must have something very strong in a case where specific performance is sought as ancillary to getting possession, to induce it to strain its jurisdiction and fix the terms of an agreement not finally arranged (2).

43. Though land be taken by a railway company not under its compulsory powers but by private contract, the jurisdiction of a Court of Equity to secure to the vendor the easements he contracted for, is not ousted by the provisions of the Railways Clauses Consolidation Act (8 Vict. c. 20) (3).

44. The Court will not grant an injunction to restrain a railway company from entering into an agreement with another railway company which would be a violation of, or inconsistent with, a subsisting agreement between the plaintiffs, a railway company, and the defendants, if the inconvenience to arise from granting the injunction is greater than the inconvenience to arise from refusing it (4).

45. If a landlord, having power to determine a lease, enter into

(1) *Sanderson v. Cockermouth and Workington Railw. Co.*, 2 H. & T. 327; 11 Beav. 497;

2 H. & T. 327.

(2) *Meynell v. Surtves*, 1 Jur. (N.S.) 80, 737.

(3) *Sanderson v. Cockermouth and*

Workington Railw. Co., 2 H. & T. 327; 11 Beav. 497.

(4) *Shaftesbury and Chester Railw. Co. v. Shrewsbury and Birmingham Railw. Co.*, 1 Sim. (N.S.) 410; 20 L. J.

(N.S.) Ch. 574; 15 Jur. 548.

an agreement with his lessee, under which he becomes purchaser of the lessee's interest, and the landlord give notice to determine the lease, the relation of vendor and purchaser is established, and a Court of Equity will not allow the tenant to be evicted by the lessor until the question as to the amount of compensation or purchase-money is settled between the parties; therefore a railway company in the position of a lessor, and, by its dealings with the lessee, also in the position of a purchaser, will be restrained from evicting the lessee, under a parliamentary notice, until the question of compensation or purchase is settled (1). A Court of Equity will refuse an injunction to restrain a company from crossing the line of another company, so far as it may disable the former company to perform a contract which it has entered into for a wayleave with an owner of land (2).

46. The authorities make the rule quite clear that in so complicated a matter as the construction of a railway, a Court of Equity will not enforce specific performance. A plaintiff's proper remedy in such a case is an action for damages on the breach of contract (3).

47. Notices by railway companies to take land cannot be treated higher than contracts; and after great delay in proceeding on such notices, they will be considered as abandoned (4). And if an original notice is not given *bonâ fide*, and a company in their subsequent proceedings treat the notice as abandoned, and in the belief of such abandonment a landowner forbears to take proceedings; the landowner will be entitled to an injunction to restrain the company from summoning a jury to assess the value of his lands (5). But a company may abandon a notice to take part of a property with the intention of taking lands under their compulsory powers, upon being required to take the whole; and such notice, without some act to obtain possession, is not a contract binding on the company (6).

(1) *Doo v. London and Croydon Railw. Co.*, 8 L. J. (N. S.) Ch. 201.

(2) *Clarence Railw. Co. v. Great North of England, Clarence, and Hartlepool Junction Railw. Co.*, 2 Railw. Cas. 763; 6 Jur. 269.

port Junction) Railw. Co., 19 W. R. 345.

(4) *Hedges v. Metropolitan Railw. Co.*, 28 Beav. 109.

(5) *Ib.*

(6) *King v. Wycombe Railw. Co.*, 28 Beav. 104; 6 Jur. (N. S.) 239; 29 L. J. (Ch.) 462.

(3) *Greenhill v. Isle of Wight (New-*

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48. A Court of Equity will restrain a company from proceeding except in relation to what is included in their notice to the owner of the land, and the jury from assessing the value of any other land than that for the purchase of which the owner has been required by the notice, to treat; and the proceeding before the jury must be consistent with the precept, and the precept with the notice (1).

49. A new tenant entering into possession without notice of the construction of an intended railway, before the company has taken possession, is entitled to a notice to treat notwithstanding a notice has been given to the prior tenant (2).

50. After a notice to treat for the purchase of property given by a railway company, neither party can get rid of the obligation to buy and sell, and the owner will be restrained from selling to any other party (3). If land in respect of which a notice has been given by a company to treat, is not required for the purposes of the railway, the Court will restrain the company from taking the land. If the company were entitled to take the land in such a case, they would be equally entitled to take land belonging to any one which happened to be within the limits of deviation, though not required for the purpose of constructing the railway (4). And a railway company having power to take land as they might think necessary for the purposes of their railway, will be restrained from compulsorily taking land which does not appear to be wanted for making their line (5).

51. If proceedings are contemplated by a railway company to assess lands which the company are not authorized by their Act to take, such proceedings will be a nullity, and, therefore, unless a case is made of any sudden grievous injury done to the inheritance, a Court of Equity will not grant an injunction to restrain the company from so proceeding (6).

(1) *Stone v. Commercial Railw. Co.*,
4 My. & Cr. 122; 1 Railw. Cas. 375.

(2) *Carter v. Great Eastern Railw. Co.*, 9 Jur. (N. S.) 618; 8 L. T. (N. S.) 197.

(3) *Metropolitan Railw. Co. v. Woodhouse*, 11 Jur. (N. S.) 296; 37 L. J. (Ch.) 297.

(4) *Vane v. Cockermouth, Keswick, and Penrith Railw. Co.*, 13 W. R. 1015.

(5) *Flower v. London, Brighton, and South Coast Railw. Co.*, 2 Dr. & Sm. 330.

(6) *Mouchet v. Great Western Railw. Co.*, 1 Railw. Cas. 567.

52. A railway company is entitled to restrain an owner of land in a mining district from taking away any of the coal necessary for the security of a bridge, the abutments of which rest upon ground which the company has taken; and whether a grant is voluntary or compulsory, it must carry with it all that is necessary to the enjoyment of the subject-matter of the grant; and therefore, if a certain amount of lateral support is essential to the safety of the railway, the right to it must, in addition to the special protection afforded by a special Act, pass as a necessary incident to the grant of the land (1). A conveyance, though gratuitous, of land to a railway company for the purposes of the line gives a right by implication, and an implied obligation is contracted to afford all reasonable subjacent and adjacent and lateral support connected with the subject-matter of the conveyance and necessary for the maintenance of the railway, but such obligation is limited by the condition of the land at the time of the grant or conveyance (2). But the grant to a railway company under their Act and the Railway Acts of the right to make and use a tunnel does not give the company such a right to support to their tunnel, that the grantor, acting in accordance with the Railways Clauses Act, sects. 77, 78, cannot work mines under and adjacent to the tunnel; and the grantor, in such a case, is in the same position in respect to his right to work mines under these two sections of the Railways Clauses Act as if the company had actually purchased the land, and the rule that a grantor cannot derogate from his own grant does not apply (3).

53. If an agreement made between two railway companies under their common seals contain clauses which are beyond the powers of the directors of one of the companies, and clauses for referring to arbitration all disputes arising under the agreement, a

(1) *North Eastern Railw. Co. v. Elliott*, 32 L. J. (Ch.) 402; 9 Jur. (N. S.) 555; 1 J. & H. 145; 2 De G. F. & J. 423; *Elliott v. North Eastern Railw. Co.*, 10 H. L. C. 333; *North Eastern Railw. Co. v. Crossland*, 32 L. J. (Ch.) 353; 2 J. & H. 565; 11 W. R. 83; 6 Jur. (N. S.) 817.

(2) *Caledonian Railw. Co. v. Sprot*,

2 Macq. 449; S. C. *sub nom. Caledonian Railw. Co. and the Glasgow G. & C. Railw. Co. v. Sprot*, 2 Jur. (N. S.) 623; *Caledonian Railw. Co. v. Belhaven (Lord)*, 3 Macq. 56.

(3) *London and North Western Railw. Co. v. Ackroyd*, 31 L. J. (Ch.) 588; 8 Jur. (N. S.) 511.

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Court of Equity will, at the suit of a shareholder of that company, restrain both companies from proceeding to arbitration in respect of alleged breaches of those clauses (1).

54. If some of the terms of an agreement between two railway companies are *ultra vires*, and cannot be carried out without the assistance of Parliament, a Court of Equity will restrain those acts which the companies can do as well as those they cannot do, all being component parts of the same illegal agreement; and the parties have no right by virtue of such an agreement, until they have obtained the authority of Parliament, to do even those acts which, independently of the agreement, they do not require the authority of Parliament to do (2). A Court of Equity will restrain the expending of the funds of a company in an application to Parliament for powers to extend the business of the company beyond the objects for which it was constituted (3). And it is well settled that the principles which are to govern in cases in which the Court is called upon to restrain the application of the funds to objects not included in the constitution of the company, between the members of large companies, are the same as those which regulate the rights in ordinary partnerships (4). So the delegation by one company of some of its statutory powers to another company, contrary to the policy of their Acts, can neither be granted nor accepted without further powers from Parliament; and will be restrained (5). But an agreement for an application to Parliament for powers necessary to enter into terms of that nature, and upon a stipulation that they shall not be acted upon until the necessary powers should have been obtained, is lawful, and will not be restrained (6).

55. The powers contained in Railway Acts are given only in

(1) *Maunsell v. Midland Great Western Railw. (of Ireland) Co.*, 1 H. & M. 130.

(2) *Hattersley v. Shelburne (Earl)*, 10 W. R. 861; 31 L. J. (Ch.) 873; 7 L. T. (N. S.) 650; *Charlton v. Newcastle and Carlisle Railw. Co.*, and *North Eastern Railw. Co.*, 5 Jur. (N. S.) 1096.

(3) *Simpson v. Denison*, 10 Hare, 51; *vide Winch v. Birkenhead, Lancashire, and Cheshire Junction Railw. Co.*, 5 De G. & Sm. 562.

(4) *Ib.*

(5) *Winch v. Birkenhead, Lancashire, and Cheshire Junction Railw. Co.*, 5 De G. & Sm. 562.

(6) *Ib.*

contemplation of the supposed public good to be obtained from the completion of the whole work authorized, and the Court will interfere when it sees that the whole undertaking cannot be completed. And a railway company is not like a partnership for general trading purposes, in which one portion of the business may be abandoned; but it is a partnership for a public purpose for effecting a work which it is a duty to complete, and the obligation to complete the work is co-extensive with the authority to make it. And therefore a Court of Equity will restrain a company from making a limited portion of a line only, with the intention of abandoning the rest, or otherwise than with the view and purpose of completing the whole (1). If a railway company has undertaken to complete a line, or any series of lines, it is bound to complete the whole line or series of lines; and is not, without parliamentary authority, at liberty to abandon any portion of its undertaking (2). But if there has been acquiescence on the part of the plaintiff, and the other shareholders have some time—for instance, eighteen months—previously to filing the bill, known, or have had the means of knowing, the acts complained of, the Court will not grant an injunction (3). Existing contracts for making part of the line are no answer to an application to prevent a railway company from making a portion of the line with an intention of completing less than the whole; though a case might arise in which the Court would not be disposed to act in a severe and strict manner, if by a small expenditure a great benefit might result to the shareholders, and a considerable advantage to the public (4). But where a railway company has formed a portion of the line, but is unable to complete the whole, the Court exercises a discretion in granting an injunction, the effect of which will be to prevent that portion from being made effective and beneficial to the public, and profitable to the shareholders (5).

(1) *Cohen v. Wilkinson*, 12 Beav. 125, 138; 5 Railw. Cas. 741, 758; 1 Mac. & G. 481; 1 H. & T. 554; *Logan v. Earl Courtown*, 13 Beav. 22; 20 L. J. (Ch.) 347; *et vide Hodgson v. Earl Powis*, 12 Beav. 392, 529.

(2) *Graham v. Birkenhead, Lancashire, and Cheshire Junction Railw.*

Co., 12 Beav. 460; *Hodgson v. Earl Powis*, *supra*.

(3) *Graham v. Birkenhead, Lancashire, and Cheshire Junction Railw. Co.*, 2 Mac. & G. 146; 2 H. & T. 450.

(4) S. C. 12 Beav. 460, 469.

(5) *Hodgson v. Earl Powis*, 12 Beav. 529; 19 L. J. (N. S.) Ch. 356.

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56. It is unauthorized and improper for railway companies to embark their funds in other railway undertakings; and they have no right to engage or pledge their funds, or entangle their affairs in unauthorized transactions, upon a speculation that they may obtain parliamentary authority for doing acts which are beyond their powers at the time when they are done (1).

57. An agreement between two railway companies, made without the authority of the Legislature, whereby one company delegates to another all the powers which have been conferred on it by Parliament, is an unlawful attempt to effect that which Parliament can alone authorize, and it is against public policy; and in such a case it is the duty of a Court of Equity to withhold its interference when called upon to act in aid of such agreements (2). But it would appear that if one railway company grants to another railway company the use of their lines, and of all conveniences upon those lines, they cannot object to their grantees using the conveniences granted for any purposes for which they (the grantees) may be able to apply them, although they (the grantors) may not themselves be entitled to use them for such purposes (3).

58. It has been absolutely and unalterably decided in the Court of Chancery, as a Court of Equity, that companies who are possessed of funds for objects which are distinctly defined by Act of Parliament cannot be allowed to apply them to any other purpose whatever, however advantageous or profitable that purpose may appear to be to the company or to the individual members of the company (4).

59. Though a duly authorized application to Parliament by directors of a railway company where there are two classes of shareholders, for an Act which will very materially alter the existing rights and interests of the two classes, is not a breach of trust or duty to the company; and to hold otherwise would be applying too strictly to a railway company the principles admitted to be applicable to private partnerships resting on private con-

(1) *Logan v. Earl Courtown*, 13 306, 310.
Beav. 22; 20 L. J. (Ch.) 347.

(3) *Ib.*

(2) *Great Northern Railw. Co. v. Eastern Counties Railw. Co.*, 9 Hare, 1.
(4) *Munt v. Shrewsbury and Chester Railw. Co.*, 13 Beav. 1.

tracts unconnected with public duties and interests, and capable of dissolution ; yet a Court of Equity will restrain the application of the funds or moneys of the company towards payment of the costs of so much of the bill as proposes to effect a scheme for the commutation of the privileges attached to one of the classes (1).

60. The Court will restrain the carrying out of a proposal by the directors of a railway company for the purpose of increasing the traffic, to guarantee certain profits, and to secure the capital of an intended steam-packet company, which was to act in connection with the railway. Such a transaction is not within the powers of the company (2). A railway company is bound to apply all its moneys and property for the purposes directed and provided for by their Act of Parliament, and not for any other purpose whatever ; and any application of or dealing with the capital funds or money in any manner not distinctly authorized by the Act, is illegal. And if directors, for purposes not authorized by the Act of the company, are proceeding to involve the company or shareholders in liabilities to which they never consented, relief may and ought to be given in a Court of Equity (3). A railway company has no power to expend funds in the prosecution of a suit not instituted by itself, and a Court of Equity will restrain it from so doing (4).

61. Although a Court of Equity will not interfere with a company merely because a particular act has been done in an informal way, which may afterwards be legally set right by them, the rule does not apply to cases of misapplication of funds which could not, under any circumstances, be rendered legal (5).

62. A Court of Equity will not interfere in a mere matter of internal arrangement—as, for instance, in the question of remuneration to directors, which is *intra vires* of a company—to do so would be to restrain a company from managing its own affairs (6).

(1) *Stevens v. South Devon Railw. Co.*, 13 Beav. 48, 58.

(2) *Colman v. Eastern Counties Railw. Co.*, 10 Beav. 1.

(3) *Salmons v. Laing*, 12 Beav. 339; 6 Railw. Cas. 289, 303.

(4) *Kernaghan v. Williams*, L. R. 6 Eq. 228.

(5) *Bagshaw v. Eastern Union Railw. Co.*, 2 H. & T. 201; 2 Mac. & G. 389; 6 Railw. Cas. 152, 169; 7 Hare, 114.

(6) *Lambert v. Northern Railw. of Buenos Ayres Co.*, 18 W. R. 180.

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Nor upon the question of gratuities if *intra vires*, and in fair management (1). Nor will it interfere in the internal management of the affairs of a continuing company, nor take upon itself to determine questions which may well and ought to be determined by the shareholders themselves at general meetings (2). But though the Court will not interfere with the internal arrangements or management of a company, it will not permit directors to resort to a contrivance for the purpose of preventing holders of shares from exercising their legal rights—for instance, their voting powers (3).

63. A company incorporated for the purpose of making a railroad cannot, with the dissent of one of the shareholders, carry on a trade distinct from the purposes for which it was incorporated (4). An Act of Parliament constituting a railway company is a contract between the company and the public, the performance of which the public has an interest in enforcing; and, therefore, a railway company with the ordinary powers will, at the suit of the Attorney-General, on the relation of a stranger to the company, be restrained from carrying on the business of coal merchants (5).

64. With regard to the interests of the public, there is no principle of public policy which renders void a traffic agreement between two lines of railway for the purpose of obtaining a uniform system of traffic management, and avoiding competition; and though a public company, constituted for a particular purpose, will not be allowed to apply its funds in a manner not sanctioned by the constitution of the company, a Court of Equity will not interfere with a traffic agreement between two lines of railway to divide the net earnings in certain definite proportions, calculated on the experience of the past course of traffic; such an agreement being *bonâ fide*, is not *ultra vires* (6). But an agreement between

(1) *Hampson v. Price's Patent Candle Co.*, 24 W. R. 754; 45 L. J. (Ch.) 437; 34 L. T. 711.

(2) *Bailey v. Birkenhead, Lancaster, and Cheshire Junction Railw. Co.*, 12 Beav. 433; 6 Railw. Cas. 256.

(3) *Cannon v. Trusk*, L. R. 20 Eq. 669; 44 L. J. (Ch.) 772.

(4) *Forrest v. Manchester, Sheffield, and Lincolnshire Railw. Co.*, 30 Beav. 40.

(5) *Att.-Gen. v. Great Northern Railw. Co.*, 1 Dr. & Sm. 154; 6 Jur. (N. S.) 1006; 29 L. J. (Ch.) 794.

(6) *Hare v. London and North Western Railw. Co.*, 2 J. & H. 80; 30 L. J. (Ch.) 817.

two railway companies that they shall work together, and that the profits shall be shared, so as to give a certain percentage to each, is beyond the powers of the companies, and illegal (1).

65. A Court of Equity will enforce by injunction a covenant by a railway company with a landowner, that land purchased by the company shall for ever be used as a station of a given character—as, for instance, a first-class station; but if a station built in pursuance of such a covenant is existing, and has not been objected to, and has remained for many years, and the passengers are not numerous, the Court will not compel a larger station to be built, although that railway had, after the station had been built, amalgamated with another company with a much greater length of railway; but it will direct what trains must stop at the station (2).

66. An agreement by a railway company with contractors for working the line, with an exemption of the contractors from certain liabilities as to accidents and certain other things, is not of such a kind as to be enforceable by an injunction restraining the company from determining the contract and resuming the possession of their line for non-compliance with impracticable requisitions, on the ground, amongst others, that the Court is asked to compel one party to employ against his will another as his confidential servant, for duties with respect to the performance of which the utmost confidence is required; and it is questionable whether such a contract is not illegal, or not against the policy of the law (3).

67. A railway associating, allying, and connecting itself with another, does not thereby become equitably “amalgamated” with it; and although an agreement to amalgamate, as from a time passed, may possibly, in Equity, amount to an amalgamation, yet an agreement to do so at a future period will not, until that

(1) *Charlton v. Newcastle and Carlisle Railw. Co. and North Eastern Railw. Co.*, 5 Jur. (N. S.) 1096 (see now as to working agreements between railway companies “The Railways Clauses Act, 1863,” 26 & 27 Vict. c. 92, part 3).

(2) *Flood v. North Eastern Railw.*

Co., L. R. 5 Ch. 525; 17 W. R. 1085; 18 W. R. 473; 19 W. R. 523; 23 L. T. (N. S.) 206, 970; L. R. 8 Eq. 666; *et vide Flood v. North Eastern Railw. Co.*, 21 L. T. (N. S.) 258.

(3) *Johnson v. Shrewsbury and Birmingham Railw. Co.*, 3 De G. M. & G. 914.

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period arrives (1). And the fact that a railway company has entered into such an agreement with another company will not exclude the former company from equitable relief by injunction to enforce a right of user of a part of a given line and joint use of a station, conferred on them by an Act passed upon a compromise to grant such user, in consideration of their withdrawing opposition to the bill of the company on whose line the user had been authorized (2). But though a Court of Equity may interfere between two railway companies entitled to the joint use of a station, by prescribing regulations for its management, yet such interference is not to take place without grave occasion; and the Court will, in a necessary case, endeavour to find its way to a partition of the station, and appoint a receiver and manager, if necessary; but where provisions exist for the settlement of disputes on the above subjects by arbitration, the Court will withhold its interposition until the remedy thus provided has been resorted to (3). A Court of Equity will restrain the obstruction of engines running over another line by an agreement as to payments for the right and as to station accommodation. And though such an agreement contain no words of succession or restriction, yet these contracts are not mere licenses revocable and determinable at the will of either party, but are agreements which confer rights of a permanent nature on companies; and an agreement to grant an easement of this nature to a corporate body need not be by deed, and may be permanent, although it is to the company only, and not to the company and their successors; and the jurisdiction of the Court to restrain by injunction an act which a defendant is by contract bound to abstain from, is not confined to cases in which there are either no executory terms in the contract, or none which a Court of Equity has not the means of enforcing (4). But the Court will not grant an injunction to restrain a company from running certain trains without stopping at a certain station for refreshment, in violation of a contract, until the right of the

(1) *Shrewsbury and Birmingham Manchester, Sheffield, and Lincolnshire Railw. Co. v. Stour Valley Railw. Co.*, 5 De G. & Sm. 138; 16 2 De G. M. & G. 866. Jur. 146; and see on the last point

(2) *Ib.*

(3) *Ib.*

(4) *Great Northern Railw. Co. v. Lumley v. Wagner*, 5 De G. & Sm. 485; 1 De G. M. & G. 604; *Dietrichsen v. Cabburn*, 2 Ph. 52.

plaintiff is established at Law ; but it will require an undertaking from the company to keep accounts, and also to pay what may be found due for the injury (1).

68. The onus lies on a company having running powers to shew that regulations made by the other company having powers to make regulations as to the construction of carriages, are unreasonable and unnecessary ; and the fact of the regulations having been wholly or in part relaxed in the past is no reason for the Court to interfere to restrain them from being strictly enforced in the future (2).

69. A railway company will not be allowed to deviate from the plans and sections deposited by the promoters with the clerk of the peace, specifying the span and height of a bridge by which the railway is to be carried over a turnpike road (3). If a railway company, in the first instance, obtain a conveyance on certain conditions as to the width of a bridge, the company will be restrained from departing from those conditions (4). And in a contract between a railway company and a proprietor of land to be crossed by the line of railway, the Railways Clauses Act (8 Vict. c. 20) should be expressly referred to, if the company intend to claim the benefit of its provisions—as, for instance, if a railway company contract to erect a bridge over a street then planned and intended, and the plan shew that the street is intended to be forty-two feet wide ; in the absence of any reference in the deed to the Railways Clauses Act, the company is not at liberty to narrow the street to the dimensions specified in sect. 49 of that Act (twenty-five feet), but must make a bridge with an arch the full width of the street (forty-two feet) (5). If a railway company, in exercise of their powers conferred on them by an Act of Parliament, which gives compensation to persons whose property may sustain damage from their operations, are

(1) *Rigby v. Great Western Railw.* 333 ; 1 De G. J. & S. 423 ; 9 Jur. Co., 19 L. J. (N. S.) Ch. 470 ; 14 Jur. (N. S.) 618, 951.
710 ; see S. C. at Law, 4 Ex. 220.

(2) *Rhymney Railw. Co. v. Taff Vale Railw. Co.*, 29 Beav. 153 ; 4 L. T. (N. S.) 534. (4) *Edinburgh and Glasgow Railw. Co. v. Campbell*, 9 L. T. (N. S.) 157.

(5) *Clarke v. Manchester, Sheffield, and Lincolnshire Railw. Co.*, 1 J. & H. 631.
(3) *Att.-Gen. v. Tewkesbury and Great Malvern Railw. Co.*, 4 Giff.

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proceeding to erect an arch above a mill-race, for the purpose of sustaining an embankment on which the railway is to be constructed, and it appear that injury would be done to the mill if the arch were of the proposed dimensions, but that the injury would be avoided if the arch were of certain larger dimensions; in such a case a Court of Equity ought to interfere, and restrain the company from making over the mill-race an arch of less than certain specified dimensions recommended by the report of an engineer appointed to make a report on the subject (1). Nothing but necessity can justify a railway company in carrying on their works for crossing a mill-stream by a bridge in such a manner, or on such a level, as will cause serious damage to the owner of the land (2).

70. A railway company having wide powers in derogation of individual rights, is bound, in constructing its works on its own land, to exercise them with moderation and discretion, and with a reasonable regard to the rights of other persons, and not in a vexatious and careless way. If a railway company can construct its works without injury to private rights, it is in general bound to do so (3). And without imputing negligence or improper motives to a company, the Court is bound to hold them within the strict exercise of their lawful rights, and to prevent them from unnecessarily injuring their neighbours' property, although the injury done is a necessary consequence of the exercise of their powers (4). The Court will interfere to stop a constantly recurring injury to a plaintiff's property—as, for instance, from floods or heavy rains washing earth on to his property—in consequence of the improper mode of the construction of the works by a railway company (5).

71. There is no restriction as to the powers of a railway company to alter levels of approaches to a bridge to be raised, over which a road is to be carried; provided the land to be affected is included in the plans and sections deposited, or mentioned in

(1) *Coats v. Clarence Railw. Co.*, Co., L. R. 16 Eq. 636, 640; 21 W. R. 1 Russ. & M. 181. 902.

(2) *Manser v. Northern and Eastern Counties Railw. Co.*, 2 Railw. Cas. 22 W. R. 613.

380; 5 Jur. 983. (5) *Keates v. Holywell Railw. Co.*,

(3) *Briscoe v. Great Eastern Railw.* 28 L. T. (N. S.) 183.

the books of reference, and full satisfaction is made to all parties interested for the damage sustained (1). If a local board of health withdraw its opposition to a railway bill upon the insertion in the Act of a clause providing that no bridge carrying a road over the railway within their district shall have an approach with a slope of more than a certain incline, the company will be restrained from permitting a bridge to remain with a slope of more than that incline; and it is no answer to say that this requisition cannot be complied with without stopping the railway (2).

72. A Court of Equity will grant a mandatory injunction, in effect compelling a railway company to pull down walls which they have built, in order to prevent another railway company from crossing the line by means of a bridge the latter company were authorized to build across the line of the former one (3).

73. A railway company will not be restrained from making a deviation within its powers of deviation, unless they capriciously use or exceed their powers, or it can be shewn that if the deviation is made, the line can be constructed in any better way than that proposed by the company (4).

74. If justices of the peace have jurisdiction to compel the construction of accommodation works by a railway company, or to enable the landowner himself to construct them, a Court of Equity will not interfere, unless there is some special ground, such as contract or the exceeding or abuse of parliamentary powers; nor until recourse has been had, in the first instance, to justices (5). And that is so, as well after the completion of the railway as during its construction (6).

75. The Court will restrain a railway company from inter-

(1) *Beardmer v. London and North Western Railw. Co.*, 1 Mac. & G. 112; 1 H. & T. 161; 5 Railw. Cas. 728; *et vide Feoffees of Heriot's Hospital v. Gibson*, 2 Dow. 301; *North British Railw. Co. v. Tod*, 12 Cl. & F. 722.

(2) *Att.-Gen. v. Mid Kent Railw. Co. and South Eastern Railw. Co.*, L. R. 3 Ch. 100; 16 W. R. 258.

(3) *Great North of England, Clar-*

ence, and Hartlepool Junction Railw. Co. v. Clarence Railw. Co., 1 Coll. 507; 5 Railw. Cas. 605.

(4) *Att.-Gen. v. Great Western Rail. Co.*, 14 W. R. 726.

(5) *Hood v. North Eastern Railw. Co.*, L. R. 11 Eq. 116; 19 W. R. 266. 23 L. T. (N. S.) 433; 40 L. J. (Ch.) 17.

(6) *Ib.*

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fering with a turnpike road, until they shall have provided another road over the proposed railway as convenient for passengers and carriages as the then present road, or as near thereto as circumstances allow, as required by the Railways Clauses Consolidation Act, 1845, s. 56 (1).

76. So a Court of Equity will oblige a railway company to comply with their Act prescribing the mode in which a turnpike road, to be crossed by a railway, is to be constructed (2).

77. The company in such cases must do as little damage as can be. In granting such an injunction the Court cannot point out to the company what they ought to do, except by stating the reasons which induce the Court to come to its conclusion, or the manner in which it appears to the Court that that which seems an evil can be remedied (3).

78. If it does not appear to be the intention of a company to break up an old road until a new one is completed, the Court will not grant an injunction, but the motion will be directed to stand over till it is ascertained whether the company will, after making the new road, proceed in an illegal course, and whether the new road is really inconvenient and contrary to the clauses of the Act (4).

79. The Court will not restrain a company from partially diverting the stream of water of a navigable river, and thereby occasioning by the works the obstruction of a private road, if the plaintiff is held to have had notice of the intended works and has acquiesced for some time—as for eighteen months (5).

80. Equity will not treat a railway company as a wrongdoer where it has under its Act constructed a bridge and carried its railway over it, although that may be prejudicial to the owner of a bridge and of tolls for passing over it under another Act; and if that party be entitled to compensation, the making of compensa-

(1) *Att.-Gen. v. London and South Western Railw. Co.*, 3 De G. & Sm. 439.

(2) *Proprietors of the Northam Bridge and Roads v. Southampton Railw. Co.*, 1 Railw. Cas. 653. See S. C. at Law, 6 M. & W. 428.

(3) *Att.-Gen. v. London and South Western Railw. Co.*, ante.

(4) *Kemp v. London and Brighton Railw. Co.*, 1 Railw. Cas. 495; 3 Jur. 403.

(5) *Illingworth v. Manchester and Leeds Railw. Co.*, 2 Railw. Cas. 187.

tion is not a condition precedent to the exercise of its powers by the railway company (1).

81. The Court will restrain the erection of buildings over a railway tunnel upon land sold by the company, where there would be danger to the public using the tunnel by their erection (2).

82. A Court of Equity will enforce by injunction the provisions of the 115th section of the Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20), that no engine or other description of moving power shall be brought or used upon a railway unless the same shall have been approved by the railway company as therein mentioned, notwithstanding the practice of railway companies has been to rely on each other with respect to the fitness of their respective engines, and not to enforce the provisions of the Act, and notwithstanding also, that to enforce such right of inspection would occasion great inconvenience and danger to the public traffic. The plain answer to this is, that the Legislature has given those rights, and the Court has nothing to do but to enforce the rights which exist (3).

83. Unpaid vendors have a lien, as against a railway company—purchasers of land—for the purchase-money (4). And in case the money is not paid, they have a right to an injunction to restrain the company from continuing in possession of the lands, until the agreement shall have been performed, and to the appointment of a receiver to enforce the lien (5). And the vendor has a right, like an ordinary vendor, to have his lien enforced by a sale of the land (6), but yet, as to an injunction to restrain the

(1) *Jones v. Stanstead, Shefford, and Chambley Railw. Co.*, 41 L. J. (P. C.) 19; 8 Moore, P. C. C. (N. S.) 312; 20 W. R. 417; L. R. 4 P. C. 98; 26 L. T. (N. S.) 456.

(2) *Att.-Gen. v. Briggs*, 1 Jur. (N. S.) 1084.

(3) *Midland Railw. Co. v. Ambergate, Nottingham, Boston, and Eastern Junction Railw. Co.*, 10 Hare, 359.

(4) *Winchester (Bishop of) v. Mid-Hants Railw. Co.*, L. R. 5 Eq. 17; *et vide St. Germans (Earl) v. Crystal Palace Railw. Co.*, L. R. 11 Eq. 568; *Pell v. Midland and South Wales*

Railw. Co., 17 W. R. 506; 20 L. T. (N. S.) 288; S. C. 16 W. R. 1077; *sub nom. Pell v. Northampton and Banbury Railw. Co.*, *Nelson (Lord) v. Salisbury and Dorset Junction Railw. Co.*, 16 W. R. 1074.

(5) *Winchester (Bishop of) v. Mid-Hants Railw. Co.*, *supra*.

(6) *Munns v. Isle of Wight Railw. Co.*, L. R. 5 Ch. 414; 18 W. R. 781; 39 L. J. (Ch.) 522; 23 L. T. (N. S.) 96; L. R. 8 Eq. 653; *et vide St. Germans (Earl) v. Crystal Palace and South London Junction Railw. Co.*, 19 W. R. 584; L. R. 11 Eq. 568; 24

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company from making use of the land until the sale, that is not a proper form of relief, as it makes the land useless to both parties (1). And the Court will not, for the purpose of enforcing the lien, restrain a company from running trains or engines over the land until a sale (directed by the Court) of the land agreed to be taken (2); nor will it restrain a company from continuing in possession after one abortive attempt to sell by the vendor, but will rather direct the land to be offered again for sale, before it will think the time has come for restraining the use of the land and delivering up possession (3). When land purchased by a railway company is sold to enforce the vendor's lien for unpaid purchase-money, it is sold freed and discharged from all conceivable claims on the part of the company, and from all conceivable claims on the part of the public, as claiming through the company (4). An unpaid vendor may have leave to work out a decree for specific performance against a railway company, notwithstanding the passing of an Act of Parliament to restrain the continuance of suits without the leave of the Court (5).

84. Preference bondholders who have been made preferred creditors by statute, with a lien upon the road, works, and property of a railway company, may restrain the directors from applying the earnings of the railway in any other way than in the order appointed by the statute (6).

85. A vendor has a lien on the land sold to a railway company, in respect of unpaid compensation for damages awarded in pursuance of the agreement for sale, as well as in respect of the purchase-money, and he is entitled to enforce that right by a sale of the land (7). And the rights of the public and of debenture

L. T. (N. S.) 288; *Keane v. Athenry and Ennis Junction Railw. Co.*, 19 W. R. 318, 43.

(1) *Munns v. Isle of Wight Railw. Co.*, L. R. 5 Ch. 414; 18 W. R. 781; 39 L. J. (Ch.) 522; 23 L. T. (N. S.) 96; L. R. 8 Eq. 653

(2) *Lycett v. Stafford and Uttoxeter Railw. Co.*, L. R. 13 Eq. 261; 41 L. J. 474.

(3) *Williams v. Aylesbury and Buckingham Railw. Co.*, 21 W. R. 819; 28

L. T. (N. S.) 547.

(4) *Munns v. Isle of Wight Railw. Co.*, *supra*.

(5) *Griffith v. Cambrian Railw. Co.*, 17 W. R. 979; 21 L. T. (N. S.) 290.

(6) *Herrick v. Grand Trunk Railw. Co.*, 7 U. C. L. J. 240.

(7) *Walker v. Ware, Hadham, and Buntingford Railw. Co.*, 35 Beav. 52; 14 W. R. 158.

creditors, and others claiming under the company, are subordinate to the vendor's lien for unpaid purchase-money (1).

86. A mortgage for securing money borrowed by a railway company, according to the form in Schedule C. of the Companies Clauses Consolidation Act (8 Vict. c. 16) comprises the lands as well as the rails and chattels of the company, and is entitled to priority over an *elegit* sued out by a judgment creditor of the company, and the sheriff will be restrained from delivering legal possession of the company's lands and rails to such a creditor (2).

87. A mortgagee of the undertaking of a railway under a debenture, has a title prior to that of a subsequent judgment creditor who has obtained an *elegit*, and if his security is in danger of being impaired by the acts of such judgment creditor, he may file a bill to protect his security, although the time fixed for the payment of the debenture-holder has not arrived (3).

88. And an injunction will lie against an attachment by judgment creditors of a railroad, of its revenues pledged for the payment of outstanding bonds (4). If there are two sets of bondholders secured by separate mortgages, one of the second set will be enjoined from collecting his bond by an execution, if the property is insufficient for all; upon the ground that such sale would interfere with the priority of the other set, and the *pro ratâ* rights of the other members of the second set (5).

89. The grantee of a rent-charge in consideration of land sold by him to a railway company, is entitled to distrain for arrears of his rent-charge upon the land as sold by him, notwithstanding the appointment of a receiver of the tolls of the company, but he will not be permitted to distrain on the rolling stock or chattels conveyed by the company to trustees for the benefit of all their creditors (6).

90. The words "dispose of" in the 128th section of the 8 Vict.

(1) *Walker v. Ware, Hadham, and Buntingford Railw. Co.*, 35 Beav. 52; 14 W. R. 158.

(2) *Legg v. Mathieson*, 2 Giff. 71; 29 L. J. (Ch.) 385; 6 Jur. (N. S.) 1010; 2 L. T. (N. S.) 112.

(3) *Wildy v. Mid-Hants Railw. Co.*, 16 W. R. 409; 18 L. T. (N. S.) 73.

(4) *Dunham v. Izett*, 15 Iowa, 284 (Amr.).

(5) *Pennock v. Coe*, 23 How. 117 (Amr.).

(6) *Eyton v. Denbigh, Ruthin, and Corwen Railw. Co.*, *Rickman v. Johns*, L. R. 6 Eq. 488; 16 W. R. 928; 38 L. J. (Ch.) 74.

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c. 18, refer to a transfer of the land to some other person, not to its application to a new purpose (1). And the abandonment by a company of the undertaking for which the lands were purchased, does not, independently of legislative enactments, give a landowner whose land has been taken compulsorily, any right to a reconveyance; and he has no equity to restrain the company from any user of the land not shewn to be productive of irreparable injury to it; and although a landowner has been compelled to part with his land to a railway company, however beneficial it may be to him that the railway should be made, no obligation is thrown on the company to complete their undertaking, and no right exists in the landowner to compel them to do so; nor, if the company should altogether abandon the undertaking, and apply the land taken under the powers of the Act to a different purpose than the making of the railway, has the landowner any new right arising from the state of things, which can be enforced in a Court of Equity; and the landowner's right of pre-emption under the 128th section does not arise before the expiration of ten years, unless the company by some act of theirs have shewn that they are about to sell and dispose of the land. But the term "superfluous lands" in the 127th and 128th sections of the Act, preceded by the expression "the lands which shall not be required for the purposes thereof" means "more than are wanted for the undertaking," and is sufficient to include the case of an undertaking being abandoned (2).

91. The permanent dedication of land taken compulsorily by a railway company from a landowner, to a purpose not being one of the purposes of their Acts, establishes the land to be superfluous land, and the landowner can enforce his right of pre-emption, and a Court of Equity will restrain the selling or disposal of the land (3).

92. A person may be an adjoining owner to superfluous lands within 8 Vict. c. 18, s. 128, although he may have purchased such adjoining lands from the company itself (4). Superfluous lands

(1) *Astley v. Manchester, Sheffield, and Lincolnshire Railw. Co.*, 2 De G. & J. 453; 4 Jur. (N. S.) 129; 27 L. J. (Ch.) 299.

(2) *Ib.*

(3) *Beauchamp (Earl) v. Great*

Western Railw. Co., 16 W. R. 1155, 241; 19 L. T. (N. S.) 189.

(4) *London and South Western Railw. Co. v. Blackmore*, L. R. 4 H. L. 610; 39 L. J. (Ch.) 713; 23 L. T. (N. S.) 504.

advertised for sale for building purposes, or nicked out for the same by a railway company, are not lands used for building purposes within 8 Viet. c. 18, s. 128, so as to defeat the right of pre-emption given by the section to the person or several persons whose lands shall immediately adjoin the land so proposed to be sold (1). All adjoining proprietors have equal rights of pre-emption, and the right of an adjoining owner to claim pre-emption of superfluous lands arises, if within the ten years allowed by the Act, the company attempt to sell such lands (2).

93. The right of pre-emption given by section 128 of the Lands Clauses Consolidation Act to persons whose lands immediately adjoin superfluous land proposed to be sold by the promoters of the undertaking, extends to lessees for years of such adjoining lands (3). Where several persons are owners of lands adjoining a piece of surplus land all in one piece, such of them as elect to exercise that right are entitled to pre-emption over the whole, before any part of it can be sold to a stranger (4). A Court of Equity will restrain the sale of lands by railway companies where rights of pre-emption exist (5).

94. It is not imperative on a Court of Equity to enforce by interlocutory injunction a statutory prohibition, and if it appear that a clause in a Railway Act prohibiting the opening of the main line until a junction line had been opened, had been introduced merely for the purpose of obliging the company to complete speedily the junction line; on an undertaking being given to complete the junction line with all practicable diligence, the Court will not restrain the opening of the main line before the completion of the junction line (6).

95. A Court of Equity will not restrain the application of the funds of a railway company in the prosecution of works by the

(1) *London and South Western Railw. Co. v. Blackmore*, 19 W. R. 305. Eq. 104; 37 L. J. (Ch.) 90; 16 W. R. 267; 17 L. T. (N. S.) 368.

(4) *Ib.*

(2) *London and South Western Railw. Co. v. Blackmore*, L. R. 4 H. L. 610; 39 L. J. (Ch.) 713; 23 L. T. (N. S.) 504.

(5) *Ib.*

(3) *Coventry v. London, Brighton, and South Coast Railw. Co.*, L. R. 5

(6) *Cromford and High Peak Railw. Co. v. Stockport, Disley, and Whaley Bridge Railw. Co.*, 1 De G. & J. 326; 24 Beav. 74; 3 Jur. (N. S.) 628.

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completion of a branch line, although the powers of the company have expired, if there has been acquiescence in the prosecution of the works and delay in applying to the Court (1).

96. A Court of Equity will restrain a declaration of a dividend on ordinary stock, made without regard to the prior right of preference shareholders in a railway company (2), and will direct from what source the arrears are to be paid, if the profits at any period of distribution are insufficient to pay in full the dividends due to the preference shareholders (3). And a preferential shareholder may file a bill to restrain a company from making a dividend prejudicial to his interests, without waiting till there are funds to make a dividend (4).

97. So the Court will grant an interlocutory injunction to restrain the declaration of a dividend, if the right to do so depends on the questions whether the interest on certain debentures can be charged to capital, or interest on extension capital can be rightly paid out of money received from contractors (5). Such questions are not merely matters of internal management, and the Court will interfere in such cases if directors are acting *ultra vires* (6). So the Court will restrain a company from issuing shares or stock in payment of dividends upon a scheme which is *ultra vires* (7).

98. The arbitrary and despotic powers given by the Legislature to public companies are granted in consideration of an expected public benefit, and companies must keep within the limits of their powers, and a Court of Equity will restrain the payment of dividends until a line not completed within the time limited has been opened, if that is the condition upon which the dividends are payable by the Act of the company (8).

(1) *Ffooks v. South Western Railw. Co.*, 1 Sm. & Giff. 142; 17 Jur. 365.

(2) *Henry v. Great Northern Railw. Co.*, 1 De G. & J. 606; 4 K. & J. 1; *vide* 26 & 27 Vict. c. 118, "The Companies Clauses Act, 1863," ss. 13-15, as to the creation and issue of new preference shares or new preference stock.

(3) *Ib.*

(4) *Sturge v. Eastern Union Railw. Co.*, 7 De G. M. & G. 158.

(5) *Bloxam v. Metropolitan Railw. Co.*, L. R. 3 Ch. 337; 16 W. R. 490; 17 L. T. (N. S.) 637; 18 L. T. (N. S.) 41.

(6) *Ib.*

(7) *Hoole v. Great Western Railw. Co.*, L. R. 3 Ch. 262; 16 W. R. 260; 17 L. T. (N. S.) 153.

(8) *Carlisle v. South Eastern Railw. Co.*, 1 Mac. & G. 689; 2 H. & T. 366; 6 Railw. Cas. 670, 682; 13 Beav. 295.

99. The non-completion of a railway by the time fixed for completion is a public wrong, and a Court of Equity has no jurisdiction at the suit of a shareholder to grant an injunction to restrain the making of any dividend until the completion of the railway (1). The misapplication of the income is the subject of internal regulation, and a Court of Equity does not attempt to direct the performance of all the duties which the governing bodies of such companies owe to the shareholders, but, on the contrary, leaves to the companies themselves the enforcement of all the duties arising out of matters which are the subject of internal management; and it cannot be safely said that in no case whatever joint-stock companies ought to be allowed to divide any profits, or receive any tolls, until all their works have been completed (2).

100. A Court of Equity will restrain the payment of dividends out of capital moneys, both to the extent of the difference between the net rent and conjectural income of surplus land, and to the extent of the conjectural increase in value of such lands; such payments are breaches of trust on the part of the directors (3). But if a company has paid for things properly chargeable to capital, out of revenue, it is justified in recouping the revenue account, at a subsequent time, out of capital, and may, if necessary, raise fresh capital under its borrowing powers, for that purpose (4).

101. The Court will not restrain the declaration of a dividend, on the ground that it is calculated upon an erroneous principle with reference to various accounts of several amalgamated lines of railway, and the profits realised; where the same principle as to matters of account has been adopted and acted upon for several successive years, and acquiesced in by the respective shareholders (5).

102. If there is a charge of misconduct on the part of a railway company, the Court will restrain the members of the managing

(1) *Browne v. Monmouthshire Railw. and Canal Co.*, 13 Beav. 32; *et vide The Skinners' Co. v. The Irish Society*, 7 Beav. 593; 12 Cl. & F. 425.

(2) *Browne v. Monmouthshire Railw. Co.*, *supra*.

(3) *Salisbury v. Metropolitan Railw. Co.*, 18 W. R. 974; 22 L. T. (N. S.)

339; *vide Evans v. Coventry*, 3 De G. M. & G. 835; 5 W. R. 187, 436; 25 L. J. (Ch.) 489; 26 L. J. (Ch.) 400.

(4) *Mills v. Northern Railw. of Buenos Ayres Co.*, L. R. 5 Ch. 621; 19 W. R. 171.

(5) *Yool v. Great Western Railw. Co.*, 20 L. T. (N. S.) 74.

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committee from obtaining payment of the deposit out of Court (1). And one of the Judges of the Court of Chancery has jurisdiction, on a bill filed, to grant an injunction to restrain the payment out of Court to the company of the parliamentary deposit, upon an order for that purpose made upon a petition made by another Judge of the Court (2).

103. After a judgment at Law in favour of the plaintiff in Equity, the plaintiff is entitled to an injunction to restrain the commission of that which would be contrary to the decision at Law, notwithstanding there is a writ of error on that judgment. As for instance, where the plaintiff has obtained judgment that certain payments to the company are overcharges—the overcharges will be restrained notwithstanding an appeal to the Lords (3).

104. Although a plaintiff may have a good defence to an action at Law, that will not necessarily prevent his proceeding in Equity likewise, as for instance, where the defendants, directors of a railway company, might be compelled to use the funds in their possession, to discharge the liabilities of the company, instead of making use of the action by the creditor as a screw for the purpose of compelling payment of the debt by the plaintiff, a shareholder (4).

105. If a legal right alone is in question, and there are facts which amount to a qualified consent and acquiescence, the Court will award damages, instead of granting an injunction to restrain the violation of the legal right by a railway company (5).

106. The Court will not restrain an obstruction by a railway company of an alleged right of way, where it is doubtful whether a public way exists and no private right is established, the remedy is by an action on the case under the provision of the Railways Clauses Act (8 Vict. c. 20) (6).

(1) *Goodman v. De Beauvoir*, 10 Jur. 938; *et vide* *Gilbert v. Cooper*, 4 Railw. Cas. 396; *Lewis v. Cooper*, 4 Railw. Cas. 413.

(2) *Castendieck v. De Burgh*, 4 Railw. Cas. 381; 5 L. J. (N. S.) Ch. 425.

(3) *Burrett v. Stockton and Darlington Railw. Co.*, 1 H. L. C. 18; see S. C. at Law, 2 Man. & G. 134; 3 Ib. 956; 1 Scott, 641; 11 Cl. & F. 590.

(4) *Fernihaugh v. Leader*, 4 Railw. Cas. 473; 15 L. J. (N. S.) Ch. 458; *et vide* *Lewis v. Billing*, 4 Railw. Cas. 414.

(5) *Lockwood v. London and North Western Railw. Co.*, 19 L. T. (N. S.) 68.

(6) *Freeman v. Tottenham and Hampstead Junction Railw. Co.*, 11 Jur. (N. S.) 107; 13 W. R. 335.

107. A Court of Equity will restrain a railway company from relying on a document as a discharge of the plaintiff's claim for injuries, if it has been obtained by fraud, if the fraud alleged by the plaintiff is not such as a Court of Law can necessarily deal with; in such a case the plaintiff will not be precluded from coming to the Court by reason of his having commenced his action for the injuries (1).

108. The act of obtaining from a poor man lying suffering from a railway accident, by persons officiously, on behalf of a railway company, going to him and getting him to accept a small and almost nominal sum, by means of false representation as to the communications which had been made about his state, is a case of directly fraudulent practice upon the man, and a directly fraudulent and false statement made to him to induce him to enter into the arrangement which was then made; under those circumstances, it appears to be a matter of course that a Court of Equity should not relinquish its jurisdiction to deal with a case of fraud of that kind, and to say that the company is not entitled to use for any purpose, or under any circumstances, an agreement which has been obtained in that way (2). But the mere allegation of a plaintiff, a gentleman of education and fully capable, unless weakened by illness or accident, of taking care of himself and understanding what was done, will not entitle him to an injunction to restrain a railway company from relying upon a plea that the plaintiff had accepted a certain sum in full satisfaction and discharge of his claim; on the ground that there was a distinct understanding that the plaintiff was not thereby to be precluded from demanding further compensation, if it turned out that his injuries were more serious than was supposed at that time; for if these facts are true, and there is no fraud, they will be an answer at Law to the defendant's plea to the action, and the whole case can be tried at Law (3).

109. The Court will not restrain a railway company by interlocutory injunction, from taking possession of works upon an

(1) *Stewart v. Great Western Railw. Co.*, 2 Dr. & Sm. 438; 2 De G. J. & S. 319; 13 L. J. (N. S.) 79; 13 W. R. 907.

(2) *Lee v. Lancashire and Yorkshire Railw. Co.*, L. R. 6 Ch. 527; 19 W. R. 729; 25 L. T. (N. S.) 77.

(3) *Ib.*

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alleged default on the part of the contractor; but the defendants ought to enter into an undertaking not to remove any of the property belonging to the contractor, if alleged to be forfeited, until the question between the company and him has been decided (1). But a railway company will be restrained from selling plant belonging to a contractor who has made default, where they have power, in that case, to take possession of the plant at a valuation, and to allow it in account with the contractor, and have also power to use it in the construction of the line, unless it appears that there is a balance of account actually due from the contractor (2).

110. If an insolvent railway company has filed a scheme of arrangement with their creditors under the Railway Companies Act, 1867 (30 & 31 Vict. c. 127), and it has been confirmed by the Court and enrolled, a debenture holder, who is one of a class which is bound by the scheme, will be restrained from enforcing a judgment obtained in respect of his debenture, before the filing of the scheme (3).

111. The insolvency of a railroad (U. S.) is no ground of injunction against the collection of subscriptions (4); but where there are sundry *fi. fas.* against an insolvent railroad, threatening to seize and sell the road, with its equipments, extending 100 miles in length, through six different counties, Equity will take jurisdiction, direct a sale of the entire property for the benefit of all concerned, and distribute the fund according to the practice and usage in Chancery in a creditor's suit against executors and administrators. In such a case no other Court possesses adequate jurisdiction to reach and dispose of the entire merits. If a creditor

(1) *Munro v. Wivenhoe and Brightlingsea Railw. Co.*, 11 Jur. (N. S.) 612; 13 W. R. 880; *et vide* *Garrett v. Banstead and Epsom Downs Railw. Co.*, 11 Jur. (N. S.) 591; 4 De G. J. & S. 723.

(2) *Garrett v. Salisbury and Dorset Junction Railw. Co.*, L. R. 2 Eq. 358; 14 W. R. 816.

(3) *Potteries, Shrewsbury, and North Wales Railw. Co. v. Minor*, 19 W. R. 883; 40 L. J. (Ch.) 685; L. R.

6 Ch. 621; 18 W. R. 87; 21 L. T. (N. S.) 545; 25 L. T. (N. S.) 522; *et vide* *Robertson v. Wrexham, Mold, and C. Quay Railw. Co.*, 17 W. R. 137; *Devon and Somersetshire Railw. Co., In re*, L. R. 6 Eq. 610; 37 L. J. (Ch.) 914; 18 L. T. (N. S.) 631; 17 W. R. 133; *South Eastern of Portugal Railw. Co., In re*, 17 W. R. 982.

(4) *Dill v. Wabash, &c.*, 21 Ill. 91 (Amr.).

neglects or refuses to come in and entitle himself to the benefit of the decree, Equity will not assist him to set aside and annul it (1).

112. If there is a question as to whether shares have or not been relinquished and transferred by an agreement with a company, the Court will restrain an action against the plaintiff for the arrears of calls upon such shares, but only on the terms of the plaintiff suffering judgment in the action, and paying the money into Court (2).

113. A Court of Equity will not interfere, upon a question of mere account between different classes of shareholders in a railway company, where the Act of the company has provided sufficient machinery for that purpose by means of arbitration (3).

SECT. 2. *Waterworks and Canal Companies.*

1. The Court of Equity will restrain a waterworks company having an Act, with the usual powers, from laying down pipes for the purpose of supplying with water beyond the limits of their powers (4). So such a Court will restrain a waterworks company from executing their works under their parliamentary powers, in such a manner as to produce an injury not authorized by those powers—as for instance, the fouling of a stream of water and rendering it unfit for the uses to which it had been applied before that injury (5). A Court of Equity will take care that public bodies who obtain authorities under Acts of Parliament do not abuse their powers (6). But the abstraction of water by a waterworks company from a stream, whereby the flow of water in the stream is diminished, does not, under the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 6, entitle a riparian owner or occupier

Waterworks
companies.

(1) *Macon, &c. v. Parker*, 9 Geo. 377 (Amr.).

(2) *Playfair v. Birmingham, Bristol, and Thames Junction Railw. Co.*, 9 L. J. (Ch.) 253; 1 Railw. Cas. 460.

(3) *Yool v. Great Western Railw. Co.*, 39 L. J. (Ch.) 562; 18 W. R. 825; 22 L. T. (N. S.) 781.

(4) *Cardiff (Mayor, &c.) v. Cardiff Waterworks Co.*, 5 Jur. (N. S.) 953.

(5) *Clowes v. Staffordshire Potteries Waterworks Co.*, L. R. 8 Ch. 125, 143; 21 W. R. 32; 42 L. J. (Ch.) 107; 27 L. T. (N. S.) 521.

(6) *Ib.*

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below, to compel the company to purchase his interest in the stream, but only to compensation under the Lands Clauses Consolidation Act, s. 68, for the stream injuriously affected (1).

2. The Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), extended by the Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), places the taking of streams upon the same footing as the taking of lands under the Lands Clauses Consolidation Act; and a Court of Equity will restrain a waterworks company from diverting a stream belonging to a plaintiff, without first paying compensation for the same, or making a deposit and giving a bond in accordance with the provisions of the Lands Clauses Consolidation Act (2).

Canal
companies.

3. If a landowner sanction the formation of a canal, neither he nor his devisee is entitled in Equity to obtain possession of the land covered by the canal, nor to interfere with the use thereof, but only to a fair compensation; and persons who buy the property with notice in the conditions of sale as to the canal, are equally bound by the same equity (3).

4. If a canal company, having power by Act of Parliament to raise an embankment to a certain height, exceed that height, a neighbouring landowner is not, on account of the possibility of injuring his lands, entitled to an injunction against the company; but there is a right to such an injunction in the Attorney-General on behalf of the public (4). A canal company is entitled to restrain the pulling down of a gate and waste-way of their canal (5). A Court of Equity will enjoin the proprietors of a canal from obstructing the use of a towing-path, which the public has a right to use as such (6).

(1) *Bush v. Trowbridge Waterworks Co.*, L. R. 10 Ch. 459; 23 W. R. 330, 641; 32 L. T. (N. S.) 182; 33 L. T. (N. S.) 137; L. R. 19 Eq. 291; 44 L. J. (Ch.) 235, 645.

(2) *Ferrand v. Bradford (Mayor, &c.)*, 2 Jur. (N. S.) 175.

(3) *Beaufort (Duke of) v. Patrick*, 17 Beav. 60; *vide Somersetshire Coal Canal Co. v. Harcourt*, 24 Beav. 571;

4 Jur. (N. S.) 1, 671; 27 L. J. (Ch.) 625.

(4) *Ware v. Regent's Canal Co.*, 3 De G. & J. 212; 5 Jur. (N. S.) 25; 28 L. J. (Ch.) 153.

(5) *The Society, &c. v. The Morris, &c.*, 2 Halst. (Ch.) 252; 1 Halst. (Ch.) 203 (Amr.).

(6) *Bosley v. Susquehanna, &c.*, 3 Bland. 63 (Amr.).

SECT. 3. *Insurance Companies.*PART II.
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1. If it appear that it is usual and advantageous for insurance and other joint stock companies to make certain payments, although not strictly bound to do so, such payments are a mode of carrying on the business with which a Court of Equity will not interfere. And in the case of insurance companies—although the policies of the insurance company contain an express exception of the losses on account of which such payments are made, the payments, being conducive to the welfare of the society, are a legitimate mode of promoting the objects of the concern, and the Court will not interfere to restrain them (1).

SECT. 4. *Banking Companies—Bank of England.*

1. If it appear that an informal mode of transacting the business of a banking company established under the 7 Geo. 4, c. 46, has existed ever since the formation of the company, the directors cannot set up their own want of observance of the formalities required by their deed of settlement, as a ground on which to fix a person with liability as a continuing shareholder, and their course of dealing will bind them; and original transfers of shares, though invalid at Law for want of a proper consent of a board of directors to the transfer, according to the provisions of the settlement, will yet, under such circumstances, be supported in Equity, and the Court will restrain an attempt to make such a person liable as a partner, and will restrain execution on a judgment at Law obtained against him (2). If by the terms of a deed of settlement of a bank, all transfers of shares therein are expressly made subject to the approval of the court of directors, there is no doubt that the company must exercise their right of approval reasonably (3). But the question whether a board of directors is

Banking companies.

(1) *Taunton v. Royal Insurance Co.*, vide *Taylor v. Hughes*, 7 Ir. Eq. Rep. 528.
2 H. & M. 135.

(2) *Bargate v. Shortridge*, 5 H. L. C. 297; 24 L. J. (Ch.) 457; *Shortridge v. Bosanquet*, 16 Beav. 84; et (3) *Robinson v. Chartered Mercantile Bank of India, London, and China*, 14 W. R. 71.

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justified, by the facts of the case, in refusing either to permit the transfer of the shares, or to purchase them for the company, is a question to be tried in Equity (1).

2. The authority to issue an injunction against a bank, on the application of the bank commissioners (U. S.), and to make such injunction perpetual, as set forth in Gen. Stats., c. 57, s. 7, is very broad and comprehensive. It is not limited to cases where the corporation is insolvent, or its further continuance in business will be hazardous to its creditors; but extends to all cases where a bank has exceeded the powers conferred on it, or has failed to comply with any of the rules, restrictions, or conditions provided by law for its regulation and management; nor is the nature of the injunction defined or limited by any legislative restriction. This is left to be determined by a sound judicial discretion. The object of conferring this very extensive jurisdiction in Equity, over this class of corporations is obvious. The nature of the important powers and duties with which they are intrusted, renders it expedient and necessary that they should be subjected to careful supervision, and that any irregularity or illegality in their mode of conducting business should be promptly checked and prevented (2).

3. Where a lien and power of sale upon and over the shares are given by charity to a bank, for debts due from the stockholders to the bank, Equity will enjoin a sale, or, under equitable circumstances, set aside a conveyance of shares attempted or made by the bank against the will of an insolvent stockholder, for a debt really due to a director, under colour that it is due to the bank; such sale being a fraudulent abuse of a statute power (U. S.), and a fraudulent attempt, without the authority of the stockholder, to give preference amongst his creditors (3).

4. If the Bank of England, having notice of a bill filed in Chancery, refuse to permit a transfer of stock, the Court, though there is no injunction, will order that they should permit the transfer on a certain day, unless the plaintiff obtain an injunction in the meantime (4). Where money in the public funds is the sub-

Bank of Eng-
land.

(1) *Taft v. Harrison*, 10 Hare, 489. 4 R. I. 372 (Amr.).

(2) *Per Bigelow, C.J.; Com. v. Bank,*
&c., 4 Allen, 8, 9 (Amr.).

(4) *Ross v. Shearer*, 6 Madd. 1; 5
Madd. 458.

(3) *Seagreaves v. Railroad Bank*,

ject of a suit to which the bank is made a defendant, the Court will not, on the application of the bank, make any order on the litigating parties to restrain them from proceeding at Law against the bank to compel a transfer, but the bank must file a bill of interpleader (1).

5. Where money has been invested by a bankrupt under a fictitious name, in order to defeat his creditors, the bank will be ordered to erase such name, and insert the name of the bankrupt (2). The Bank of England are not to look beyond the legal title to the trusts of a will, and therefore cannot prevent an executor from selling out or transferring stock into his own name (3); and though a residue is specifically given, the bank has no right to restrain an executor from transferring the funds (4).

6. The Court will not direct the Bank of England to remove a distringas from stock belonging to a partnership firm, on an application of a defendant, the surviving partner (5). Nor will the Court interfere to require the bank to transfer money which they withhold, on a bill filed by the representative of a deceased partner against survivors of the firm, even for the purpose of paying the partnership debts (6).

7. The Court will grant an injunction against a London joint stock bank and their agents to restrain the acceptance of bills of exchange payable on demand, or at less time than six months from the acceptance thereof, as being a violation of the exclusive privileges of the Bank of England within the 3 & 4 Will. 4, c. 98, s. 3 (7).

8. The Court will not compel the Bank of England to accept such evidence of death as, in uncontested cases, would be considered sufficient by the Court of Chancery. The Bank has a discretion to exercise for its own protection, and the Court will not compel it, when exercising that discretion *bonâ fide*, to depart from its own settled practice (8).

(1) *Birch v. Corbin*, 1 Cox, 144; *vide Birch v. Corbyn*, 1 Bro. C. C. 571. (5) *Toulmin v. Copeland*, 7 Price, 631.

(2) *Green v. Bank of England*, 3 Y. & C. 722. (6) *Ib.*, 6 Price, 405.

(3) *Bank of England v. Parsons*, 5 Ves. 665. (7) *Booth v. Bank of England*, 7 Cl. & F. 509; West, 298; *Bank of England v. Booth*, 2 Keen, 466.

(4) *Bank of England v. Moffatt*, 3 Bro. C. C. 260. (8) *Prosser v. Bank of England*, L. R. 13 Eq. 611; 41 L. J. (Ch.) 327; 20 W. R. 362; 26 L. T. (N. S.) 60.

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SECT. 5. *Companies in general.*

1. Acts of Parliament for making canals, railroads, &c.; are powers given by Parliament over the land of the different proprietors through whose estates the works are to proceed. Each proprietor, therefore, has a right to have the power strictly and literally carried into effect as regards his own lands, and also has a right to require that no variation shall be made to his prejudice. But if the Act is faithfully carried into execution as regards his own lands, he cannot, on the mere ground of a variation which is not injurious to himself, and which was made with the consent of others, obtain from a Court of Equity an injunction to stay the proceedings (1). *

2. In matters strictly relating to the internal management of a company, even though the course adopted is not within the terms of the instrument of foundation, a Court of Equity will not interfere (2). But such a Court will interfere with the internal affairs of joint-stock companies, by granting an injunction and appointing a receiver, where such companies are in a condition in which there is no properly constituted governing body, or where there are such dissensions in the governing body that it is impossible to carry on the business with advantage to the parties interested, but it will interfere to as small an extent as possible (3).

3. If the matters complained of, are plainly beyond the powers of the company, and are inconsistent with the object for which the company was constituted, the Court will interfere at the instance of the minority, to prevent the act complained of from being carried out (4).

4. But it is clear that with regard to everything that is within the powers of a joint stock company, the majority of shareholders have power to deal with the assets of the company, and to bind the minority (5).

(1) *Lee v. Milner*, 2 Y. & C. Ex. R. 611, 618.

(2) *Gregory v. Patchett*, 10 Jur. (N. S.) 1118; 13 W. R. 34; *et vide* *Stevens v. South Devon Railw. Co.*, 9 Hare, 313; *Lord v. The Governors and Company of Copper Miners*, 2 Ph. 741; 1 H. & T. 85; *Foss v. Harbottle*,

2 Hare, 492; *Mozley v. Alston*, 1 Ph. 800.

(3) *Featherstone v. Cooke*, *Trade Auxiliary Co. v. Vickers*, L. R. 16 Eq. 298, 301, 305.

(4) *Gregory v. Patchett*, 10 Jur. (N. S.) 1118; 13 W. R. 34.

(5) *Australian Auxiliary Steam*

5. If it appear that it is usual and advantageous for a joint stock company to make certain payments, although not strictly bound to do so, such payments are a mode of carrying on the business with which a Court of Equity will not interfere; the payments being conducive to the welfare of the society are a legitimate mode of promoting the objects of the concern, and the Court will not interfere to restrain them (1). Though a transaction be *ultra vires*, or improper, an acquiescence for a long period, as for instance six years, on the part of dissentient shareholders, will preclude them from impeaching it. Shareholders cannot be permitted to lie by, sanctioning, or by their silence acquiescing in, an arrangement which is *ultra vires* of the company, watching the result, and, if it be favourable and profitable to themselves, to abide by it and insist upon its validity, but if it prove unfavourable and disastrous, then to institute proceedings to set it aside (2).

6. A Court of Equity will not restrain a company from doing an act within the scope of its objects, on the ground that if the company does that act, the doing of it may incapacitate the company from performing something else, which is also within the scope of its objects (3). A simple contract creditor of a company is not entitled to restrain the company from dealing with their assets as they please, on the ground that they are diminishing the fund for payment of his debt (4). A shareholder who seeks to restrain a company from doing an act *ultra vires*, must shew, by distinct and definite averments, the illegality of the acts (5). Although it is the undoubted right of every shareholder in a company to prevent the directors from exceeding their powers, still, where it appears that a plaintiff is merely a puppet in the hands of others, not shareholders in the company,

Clipper Co. v. Mounsey, 4 K. & J. 733; 27 L. J. (Ch.) 729; 4 Jur. (N. S.) 1224; *vide Exeter and Crediton Railw. Co. v. Bullen*, 5 Railw. Cas. 211; 16 L. J. (Ch.) 449; 11 Jur. 527, 532.

(1) *Taunton v. Royal Insurance Co.*, 2 H. & M. 135.

(2) *Gregory v. Packett*, 10 Jur. (N. S.) 1118; 13 W. R. 34.

(3) *Syers v. Brighton Brewery Co.*, 11 L. T. (N. S.) 560.

(4) *Mills v. Northern Railw. of Buenos Ayres Co.*, 23 L. T. (N. S.) 719.

(5) *Ib.*

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who have indemnified him against the costs of the suit, the Court will not interfere by an interlocutory injunction (1).

7. If an incorporated company employs its powers and funds for purposes not within the scope of its charter, a stockholder may have a remedy by injunction. But independently of its thus exceeding its powers, the will of a majority, properly expressed at a legal meeting, must control (2). A misapplication of money contrary to the charter of articles of agreement, is a breach of trust and fraud on the part of the majority towards the minority, who have a remedy by injunction; intentional wrong or actual fraud is not necessary to sustain a bill for relief (3). Where it is clearly shewn that a public company is exceeding its powers, a Court of Equity will not refuse to interfere by injunction (4); though this must be taken as a general rule only, and does not apply where the damage is slight (5), or damages at Law are a sufficient and proper remedy (6), or the trespass is temporary (7).

8. It is quite settled, that a company established for one purpose cannot, against the will of any dissentient minority, however small, undertake a business foreign to the objects of the original company. Thus a railway company cannot become a steam-boat company, cannot carry on a brewery, or the like. It is also settled that no portion of the funds subscribed for the original purpose can be applied in procuring or in endeavouring to procure the means of carrying on another and different undertaking, such as soliciting a bill in Parliament to confer on the company the powers necessary for that purpose (8).

9. A Court of Equity will not interfere to prevent the directors of a limited company from commencing business, on the ground that all the nominal capital has not been subscribed for, nor on

(1) *Filder v. London, Brighton, and South Coast Railw. Co.*, *Barchard v. Brighton, Uckfield, and Tunbridge Wells Railw. Co.*, 1 H. & M. 489.

(2) *Gifford v. New Jersey, &c.*, 2 Stockt., 171 (Amr.).

(3) *March v. Eastern, &c.*, 43 N. H. 515 (Amr.).

(4) *River Dun Navigation Co. v. North Midland Railw. Co.*, 1 Railw. Cas. 135.

(5) *Warden of Dover Harbour v. South Eastern Railw. Co.*, 9 Hare, 497.

(6) *Turner v. Blamire*, 1 Drew. 409.

(7) *Standish v. Mayor of Liverpool*, 1 Drew. 1; *et vide Wood v. Charing Cross Railw. Co.*, 33 Beav. 290.

(8) *Lyde v. Eastern Bengal Railw. Co.*, 36 Beav. 10, 14.

the ground that the business actually commenced is on a much smaller scale than that contemplated by the prospectus, where there is no allegation of fraud, or of improper or *malá fide* management (1). But a payment of interest on the amount paid up of the share capital, to the shareholders, before any profits have been realised, out of capital or borrowed moneys, even though made in pursuance of a resolution at a meeting, or by a majority of the shareholders, is *ultra vires*, and will be restrained by injunction, as being, in effect, a lessening and repayment of the capital to the prejudice of the creditors (2). If parties who have a majority of shares in a company, make an arrangement, by which they deal with matters affecting the whole company, the interest in which belongs to the minority as well as to the majority, in consideration of their obtaining for themselves certain advantages, the majority putting something into their pockets at the expense of the minority; the minority have a right to have their share of the benefits ascertained for them in the best way in which the Court can do it, and given to them. Although it may be quite true that the shareholders of a company may vote as they please, and for the purpose of their own interests, yet the majority of shareholders cannot sell the assets of the company and keep the consideration, but must allow the minority to have their share of any consideration which may come to them (3).

10. A Court of Equity will, at the instance of the dissatisfied shareholders of a company, restrain further proceedings under an arbitration clause in an agreement entered into by two public companies, where the principal agreement is clearly *ultra vires*; and if directors of a company affix the company's seal to an agreement, part of which is *ultra vires*, the Court will, at the suit of dissenting shareholders, declare the agreement, so far as it purported to bind the company to the clauses *ultra vires*, void; and as to that part will restrain the other parties to the agreement from enforcing their rights (4).

(1) *Macdougall v. Jersey Imperial Hotel Co.*, 2 H. & M. 528; 34 L. J. (Ch.) 28; 12 W. R. 1142; 10 Jur. (N. S.) 1043. L. J. (Ch.) 330; 22 W. R. 257, 396; 30 L. T. (N. S.) 209.

(2) *Ib.*

(3) *Menier v. Hooper's Telegraph Works*, L. R. 9 Ch. 350, 353, 354; 43 L. J. (Ch.) 513; 8 L. T. (N. S.) 347.

(4) *Maunsell v. Midland Great Western (Ireland) Railw. Co.*, 1 H. & M. 130; 32 L. J. (Ch.) 513; 8 L. T. (N. S.) 347.

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11. A public company exceeding its legislative limits, cannot be restrained by injunction, at the suit of a co-rival company, which does not allege that it has sustained some private injury by such excess, though the acts complained of may be injurious to the public interests (1).

12. A Court of Equity will restrain a company and its directors from doing an act which would occasion a forfeiture of the company's charter (2).

13. Equity, in exercising its jurisdiction to prevent companies entrusted with large powers by the Legislature, from acting in a manner prejudicial to the rights of individuals on the one hand, will, on the other, be careful not to assist persons in availing themselves of any omission in such powers, for the purpose of giving effect to exorbitant claims against the companies (3).

14. Under the Companies Act, 1862, sect. 47, a company not otherwise having this power, has not power to issue negotiable instruments, and therefore to accept bills of exchange; but that power exists where it is conferred by general words in the memorandum and articles giving a power to the directors to do all things and make all contracts, which, in their judgment, are necessary and proper for the purpose of carrying into effect the object mentioned in the memorandum; and the Court will not restrain an execution under a judgment obtained upon bills of exchange issued by a company, where that power has been conferred by such general words (4).

15. A Court of Equity will not, at the instance of a shareholder, restrain a joint stock company (*quâ* corporate body) incorporated by Acts of Parliament which prescribe its constitution and objects, from applying in its corporate capacity to Parliament, and from using its corporate seal and resources to obtain the sanction of the Legislature to the remodelling of its constitution, or to a material alteration and extensions of its objects and powers (5). And it

(1) *Stockport District Waterworks Co. v. Manchester (Mayor, &c.)*, 11 W. R. 156.

(2) *Rendall v. Crystal Palace Co.*, 4 K. & J. 326; 27 L. J. (Ch.) 397.

(3) *Bell v. Hull and Selby Railw.*

Co., 1 Railw. Cas. 616.

(4) *Peruvian Railw. Co. v. Thames and Mersey Marine Insurance Co.*, L. R. 2 Ch. 617; 36 L. J. (Ch.) 864.

(5) *Ware v. Grand Junction Waterworks Co.*, 2 Russ. & My. 470.

would seem that the right of making such an application is incident to a corporation of this nature (1).

16. A Court of Equity will not compel specific performance of an agreement by a company to employ a person as a broker: such a Court cannot compel an agent to fulfil his duties, and if the contract is at an end, by having been broken by the company, it is impossible to carry out that which is merely an adjunct to the principal relief sought, namely, an injunction to restrain the company from advertising, in breach of the stipulation contained in the agreement, the name of any other person than the plaintiff as their broker (2).

17. A public company taking land under compulsory powers is bound to give the landowner precise information of the quantity of land to be taken, and the way in which it is to be used; and it is incumbent on the company to prove clerly and distinctly from their Act the existence of the powers they claim a right to exercise; and if there is any doubt with regard to the extent of the powers they claim, that doubt should undoubtedly be for the benefit of the landowner (3). Persons obtaining from the Legislature powers to interfere with the rights of property for their own purposes (whether of a local nature or merely private) are bound strictly to adhere to the powers so conceded to them—to do no more than the Legislature has sanctioned, and to proceed only in the mode in which the Legislature has pointed out; but (except in a proceeding at the instance of the Attorney-General), any one seeking the assistance of a Court of Equity is bound to shew that he has an interest in preventing the defendants from doing what is, in fact, or may well be called, a violation of their contract with the Legislature, he must shew not only that the defendants are committing, or intent to commit, a wrong, but also that the wrong complained of does occasion, or will occasion, loss or damage to himself; that he has a special or private interest in confining the defendants within the limits of their parliamentary powers (4). Ownership

(1) *Ware v. Grand Junction Waterworks Co.*, 2 Russ. & My. 470.

(2) *Brett v. East India and London Shipping Co.*, 12 W. R. 526; *vide Mair v. Himalayan Tea Co.*, 11 Jur. (N. S.) 1013; 14 W. R. 165.

(3) *Simpson v. South Staffordshire Waterworks Co.*, 4 De G. J. & S. 679, 686; 34 L. J. (Ch.) 380; 11 Jur. (N. S.) 453.

(4) *Liverpool (Mayor of, &c.) v. Chorley Waterworks Co.*, 2 De G. M. & G. 852.

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acquired in land by a public company under their compulsory powers, for the purpose of their works, is a qualified ownership, to be restricted to the purposes expressed in the Act, those purposes being of the essence of the contract; and therefore the landowner whose comfort and enjoyment of the remainder of his estate are affected by the company applying the ownership for other purposes not contemplated by the Act, is entitled to an injunction to restrain the use of the land for such purposes (1). The rights of ownership in fee conferred on public companies by Act of Parliament are, by the settled doctrine of the Court of Chancery, as a Court of Equity, restricted and qualified by the terms of the legislative contract (2). And where purchases of land are made under the compulsory powers of an Act of Parliament, the purchasers on the one hand, and the vendor on the other, have a right to confine the exercise of the ownership to the specified purpose (3). Still unless an actual injury results to a private individual himself, from the excessive exercise of the powers of a company, he is not entitled to an injunction; and where there has been an excess of the statutory powers granted to a company, but no injury has been occasioned to any individual, and there is none which is imminent or of irreparable consequence, the Attorney-General can alone obtain an injunction to restrain the exorbitance (4).

18. A Court of Equity will not allow bodies to whom Parliament has given powers of making compulsory purchase of land, to avail themselves of their parliamentary powers, by taking land which they do not require for a *bonâ fide* purpose sanctioned by their Act of Parliament; and it is the duty of every Court to keep such companies strictly within their Act of Parliament (5). But although it may be the case that subsequent events have given the company a title which they had not in the beginning, yet, if it appear that they have at the time of the application to the Court, the right to take the land, it would

(1) *Bostock v. North Staffordshire Railw. Co.*, 5 De G. & Sm. 584; 3 Sm. & G. 283; 2 Jur. (N. S.) 248; 3 Jur. (N. S.) 245; 25 L. J. (Ch.) 325.

(2) *Ib.*

(3) *Ib.*

(4) *Ware v. Regent's Canal Co.*,

3 De G. & J. 212; 5 Jur. (N. S.) 25; 28 L. J. (Ch.) 153; *et vide Att.-Gen. v. Great Northern Railw. Co.*, 29 L. J. (Ch.) 794.

(5) *Webb v. Manchester and Leeds Railw. Co.*, 4 My. & Cr. 116.

seem that the Court would not interfere to prevent them exercising that right (1).

19. So where persons have especial powers conferred on them by Parliament for effecting a particular purpose, they cannot be allowed to exercise those powers for any purpose of a collateral kind; therefore, a company authorized (making due compensation) to take compulsorily the lands of any person for a definite object, may be restrained by injunction from any attempt to take them for another object. And where the Legislature has conceded power to a body of adventurers for a certain purpose, as, for example, the formation of a railway, such a body must shew some ground for the concession, and the Legislature has no concern with its means for obtaining the funds to carry its declared objects into effect, and in order to effect them it must not exceed the limits of its powers. But the case is different where an existing public body, such as the corporation of a city, is entrusted by the Legislature with the duty of making public improvements in its city, the powers thus entrusted to it for such a purpose will not be subject, as in the other case, to a strict and restrictive construction (2).

20. If a Court of Law, acting under the Joint Stock Companies Registration Act, 7 & 8 Vict. c. 110, has given to one shareholder judgment against a company without assets, a Court of Equity will not prevent that judgment from being enforced against another shareholder, for a Court of Common Law has full jurisdiction to deal with the case (3).

21. If directors act on a void forfeiture of shares, the holder is entitled to an injunction restraining them from enforcing the forfeiture, and to have the same cancelled (4).

22. Directors of a public company will not be allowed to purchase the debt of a general creditor of the company, and then to sue a single unwilling shareholder in his name, so as to enforce contribution against a particular shareholder, who is not willing to bear his share of the losses (5). The principle is, that where it is not in fact the action of the creditor, but of the directors, who

(1) *Webb v. Manchester and Leeds Railw. Co.*, 4 My. & Cr. 116.

(2) *Galloway v. London (Mayor, &c.)*, L. R. 1 H. L. 34; 11 Jur. (N. S.) 474; 12 Jur. (N. S.) 747.

(3) *Hardinge v. Webster*, 1 Dr. & Sm. 101; 6 Jur. (N. S.) 88.

(4) *Sweney v. Smith*, L. R. 7 Eq. 324; 38 L. J. (Ch.) 446.

(5) *Beck v. Dean*, 3 Jur. (N. S.) 14.

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are setting the creditor in motion, a Court of Equity will not allow contribution to be obtained in that manner—it must be done in a direct way (1). But the Court will not restrain a creditor of a joint stock company from enforcing payment of his debt against an individual shareholder, on the ground merely that the creditor was himself a shareholder, and therefore liable to contribute; such interference would defeat the rule at Law, which, for convenience, enables creditors of such companies to recover their debts by that form of proceeding, leaving them, of course, to their right to contribution against their co-partners (2).

23. Where there is no admission of a trust so as to entitle plaintiffs to an order for payment of money into Court, a Court of Equity has not jurisdiction, upon an interlocutory application, to restrain the directors of a company from parting with moneys which *primâ facie* belong to that company, with which, by the articles of the company, the directors have authority to deal, the questions of trust and right to the money having to be decided at the hearing of the cause (3).

24. A Court of Equity will restrain a sale by mortgagees who, being directors of the company, have become mortgagees in violation of the Joint Stock Companies Act, 1856 (4).

25. A Court of Equity will not permit the provisional directors of a joint stock company, without the authority of the plaintiff, to publish a prospectus stating him to be a trustee of the company; on the ground that by so doing the plaintiff would be exposed to risk by the act of the defendants in using his name, and that he would be left to get rid of his responsibility with regard to money placed in his name at the bankers of the company to his account as trustee as he could (5).

26. A statement true to the letter, but in substance a misrepresentation put forward to mislead the public, is sufficient ground for cancelling an allotment of shares to a person who has applied for shares on the faith of such statement, and his deposit on the shares

(1) *Beck v. Dean*, 3 Jur. (N. S.) 14.

(2) *Rhean v. Smith*, 2 Ph. 726.

(3) *Bank of Turkey v. Ottoman Co.*,
L. R. 2 Eq. 366; 14 L. T. (N. S.) 545;
14 W. R. 819.

(4) *Southampton Boat Co. v. Raw-*

lins, 12 W. R. 331; *Southampton Boat*

Co. v. Pianock, 12 W. R. 330; *South-*

ampton Boat Co. v. Muntz, 12 W. R.
330.

(5) *Routh v. Webster*, 10 Beav. 561.

will be directed to be repaid to him, his name removed, and an injunction granted to restrain an action for calls in respect of the shares (1).

27. If there is misrepresentation in a prospectus that will overthrow the contract between a shareholder and the company; and if the statement relates to the directors' own acts, they must be fixed with a guilty knowledge of the misrepresentation. And such a shareholder is entitled to repayment of his deposit and allotment money of the shares, to have his name removed from the register of shareholders, and to an injunction to restrain the company from taking further proceedings on a judgment obtained in an action upon a call (2).

28. A person who has been induced to take shares in a company, on the faith of a statement in the prospectus as to the nature of a property contracted to be purchased, which turns out to be untrue, is entitled to an interlocutory injunction to restrain an action for calls, although the directors have been themselves deceived, and have been guilty of no wilful fraud (3). But a person seeking to set aside a voidable contract to take shares in a company, on the ground of misrepresentation, must take steps for that purpose immediately on discovery of the misrepresentation; delay will disentitle him to repudiate the shares, either as between himself and the creditors of the company, or as between himself and the other shareholders (4).

29. The misconduct of directors of a company in inducing a person to become an allottee of shares in the company by improper concealment and unfounded representation, is not a vice that taints the share itself into whosoever hands it passes, but the share itself may be purified by the conduct of the allottee or any subsequent holder of the share; and if the allottee is barred by time or condonation, the transferee is bound also by the same bars (5). But the only amount of delay which can be a bar to

(1) *Ross v. Estates Investment Co.*, L. R. 3 Ch. 682; 37 L. J. (Ch.) 873; 36 L. J. (Ch.) 54; 16 W. R. 1151; 9 L. T. (N. S.) 61.

(2) *Henderson v. Lacon*, L. R. 5 Eq. 249; 18 L. T. (N. S.) 527; 16 W. R. 328; *vide In re Reese River Co., Smith's Case*, L. R. 2 Ch. 604.

(3) *Smith v. Reese River Silver Mining Co.*, L. R. 2 Eq. 264; 12 Jur. (N. S.) 616; 14 W. R. 606.

(4) *Ogilvie v. Currie*, 37 L. J. (Ch.) 541; 16 W. R. 769; 18 L. T. (N. S.) 593.

(5) *Peck v. Gurney*, L. R. 6 H. L. 377, 384, 402; L. R. 13 Eq. 79, 117, 118; 43 L. J. (Ch.) 19; 41 L. J. (Ch.) 436.

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relief in such cases, is fixed by the Statute of Limitations. Such cases being similar to actions at Law for deceit; no bar will arise from delay unless the delay be such as would bring that statute applicable to such cases into operation (1).

30. Although the books and papers of a company are the property of its shareholders, and they are entitled to inspect them, though there is a secrecy clause in the articles of association, and though in the course of inspection they will become acquainted with matters which should be kept secret; yet it is their duty not to divulge such information so acquired, and a Court of Equity will restrain them by injunction from so doing (2).

31. If an incorporated company stands by and permits expensive works to be executed at the spot where its premises are situate and its operations carried on, the company must be considered, for all purposes of knowledge and acquiescence, to be in the same position as a private individual (3).

32. Although the declaration of a chairman of the election of directors of a company is *primâ facie* evidence of the validity of such election, yet if the declaration has been done by means of a conspiracy, a Court of Equity will find its arm long enough to deal with such a fraud (4).

33. If the specific acts complained of by one of the shareholders of an incorporated company are not clearly such as, in the opinion of a Court of Equity, it is incompetent to a majority of the shareholders to sanction, and there is no allegation raising any case for the interference of a Court of Equity with the exercise of rights within the powers of the corporation, a Court of Equity cannot assume jurisdiction in such a case, without opening its doors to all parties interested in corporations and joint stock companies, or private partnerships, who, although a small minority of the body to which they belong, may wish to interfere in the conduct of the majority (5).

(1) *Peck v. Gurney*, L. R. 6 H. L. 377, 384, 402; L. R. 13 Eq. 79, 117, 118; 43 L. J. (Ch.) 19; 41 L. J. (Ch.) 436.

(2) *Ex parte Brinsley, Ex parte Buchan*, 36 L. J. (Ch.) 150.

(3) *Laird v. Birkenhead Railw. Co.*, Joh. 500, 510; 29 L. J. (Ch.) 218.

(4) *Wandsworth and Putney Gas Light and Coke Co. v. Wright*, 18 W. R. 728; 22 L. T. (N. S.) 404.

(5) *Lord v. Governor, &c., of Copper Miners*, 2 Ph. 740; 1 H. & T. 85; 2 De G. & Sm. 308; *vide Foss v. Harbottle*, 2 Hare, 493; *Mozley v. Alston*, 1 Ph. 790, 800.

PART III.

THE DOCTRINES AND PRINCIPLES OF THE LAW OF INJUNCTIONS
AS APPLICABLE TO THE VARIOUS SUBJECTS OF INJUNCTIONS,
WHERE IT IS NECESSARY TO RESTRAIN PROCEEDINGS IN
COURTS OF LAW AND OTHER COURTS.

CHAPTER I.

THE DOCTRINES AND PRINCIPLES IN RESTRAINING PROCEEDINGS
IN COURTS OF LAW AND OTHER COURTS, AS APPLICABLE TO
REAL PROPERTY (INCLUDING LEASEHOLDS).

SECT. 1. *Ejectment—Possession.*

1. A Court of Equity will not grant an injunction to restrain Ejectment. proceedings in ejectment before judgment has been obtained in such proceedings (1), or except the defendant at Law give a complete judgment at law (2); unless where parties are in trade, in that case the Court will do so, to prevent the inconvenience which would arise by the recovery of a judgment against them (3). But the Court has no power to order a plaintiff to give judgment in the ejectment (4).

2. To entitle a plaintiff to an injunction to stay an ejectment, the statement of a legal inference not supported by the facts, is not enough (5).

3. To entitle a plaintiff to stay proceedings in an ejectment, the plaintiff must allege facts which raise an equity which will entitle him to the injunction. If a party is in possession of an estate by a good equitable title, and the legal estate, if not in him, is in

(1) *Hudson v. Temple*, 9 W. R. 243.

(3) *Hudson v. Temple*, *ante*.

(4) *Brown v. Newall*, 2 My. & Cr.

(2) *Redmond v. Goodall*, 2 Jones, 558.

812; *vide Horne v. Thompson*, Sau. & Sc. 615.

(5) *Brown v. Newall*, 2 My. & Cr. 558, 569, 576.

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another person as a constructive trustee for him, the party in possession is entitled to an injunction to restrain proceedings in ejectment by the party who, if successful, would be his trustee, whether the legal estate is in the party in possession or not (1). If the conduct of one person induces another to alter his conduct, that will make a binding contract, therefore if a party in possession of a leasehold house is told verbally that she shall have the house for life upon the payment of the ground rent and rates and taxes, and that party abandons a previous intention of purchasing a business as a means of livelihood, and remains in the house and maintains herself by means of the letting of lodgings, Equity will enforce such a contract, as the circumstances of the case take it out of the Statute of Frauds, and will restrain an action of ejectment to recover possession of the house (2).

4. If an equitable tenant for life, in possession of the estate with his lessee, commit waste and refuse to permit the trustee to examine the condition of the land, the Court will not continue an injunction to restrain an action of ejectment by the trustee, even on the plaintiff undertaking to cut no more timber and to permit the inspection (3). The Court will restrain proceedings in an ejectment against a purchaser of a lease taken in execution under a *fi. fa.* put into possession by the sheriff, but without an assignment of the term (4).

5. If a yearly tenant, having the option of purchasing the property, files his bill against the landlord for a specific performance of the contract for sale, the Court will restrain ejectment by the landlord, if the tenant will undertake to continue to pay the rent without prejudice (5). But if a tenant has violated the conditions of an agreement for a lease of a farm, under which he has taken possession, the Court will not, upon a bill by the tenant for a specific performance of the agreement, restrain an ejectment by the landlord (6). There will be no specific performance of an agreement to grant a lease where, had one been executed, the lessor would have had a right to determine it for breach of cove-

(1) *Crofts v. Middleton*, 8 De G. M. & G. 192; 25 L. J. (Ch.) 513.

(2) *Coles v. Pilkington*, 23 W. R. 41; L. R. 19 Eq. 174, 177; 31 L. T. (N. S.) 423; 44 L. J. (Ch.) 381.

(3) *Pugh v. Vaughan*, 12 Beav. 517.

(4) *Jones v. Hughes*, 1 Hare, 383.

(5) *Pyke v. Northwood*, 1 Beav. 152.

(6) *Porrett v. Barnes*, 2 L. J. (Ch.) 142.

nant (1). But an interlocutory injunction, obtained by a party in possession on a bill for specific performance of an agreement for a lease, to restrain an ejectment, will be continued till the hearing on an undertaking by the plaintiff to give judgment in the ejectment and paying rent into Court, though there are allegations in the defendant's answer of the plaintiff's insolvency and breaches of the agreement (2). There is a distinction as to an injunction to restrain ejectment between landlord and tenant upon an actual lease, and upon a mere covenant for a lease; in the latter case the Court will grant no relief if the lease sought must contain a covenant which would have been violated and against which no relief can be had; in the former case some ground is necessary, either by the conduct of the lessor, or under the 4 Geo. 2, c. 28 (3).

6. The fact that there has been an agreement by the intended lessee, in a contract to make a lease with an option to purchase, will not disentitle the lessee to specific performance of a contract to sell, where that contract is a distinct and separate part of the agreement, and the Court will restrain an ejectment by the vendor (4). The jurisdiction of a Court of Equity extends to remove any impediment to the fair trial of the real question at Law, but not to the trial of the question; and it will restrain a defendant from proceeding upon a judgment obtained by surprise, and from setting up an agreement for a lease in any action or other proceeding at Law in respect of the property (5).

7. If a receiver has been appointed of an estate, part of which is copyhold, the Court will restrain an action of ejectment by the lord against the terre tenant (6).

8. A Court of Equity will relieve a tenant who has allowed judgment in ejectment for breach of covenants for non-payment of rent, insurance, and repairs, to go by default, where the circumstances under which the judgment was obtained are such that it cannot be considered either as a confession of the breach of covenant or an adjudication that there had been any breach at all, and

(1) *Gregory v. Wilson*, 9 Hare, 683.(4) *Green v. Low*, 2 Jur. (N. S.)(2) *Boardman v. Mostyn*, 6 Ves. 848.467. (5) *Griffith v. Edwards*, 2 Jur.(3) *Lovat v. Lord Ranelagh*, 3 V. & (N. S.) 584.B. 24. (6) *Evelyn v. Lewis*, 3 Hare, 472.

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the Court of Equity is not satisfied that the acts alleged were in positive breach of any of the covenants, but such relief will be on the terms of payment of the taxed costs at Law, the arrears of rent, the amount due for repairs and insurance, and costs in Equity, the defendant to account to the plaintiff for the rent received by him (1). The Court will relieve against an ejectment for a breach of covenant to repair, where the lessee is unable, from circumstances over which he has no control, to complete the repairs within the time specified (2).

9. A Court of Equity will not interfere generally to restrain an ejectment brought against a lessee for breaches of covenant in the lease, except for breach in non-payment of rent (3). The lessee in a building lease is responsible for the acts or omissions of the persons he employs to do the work required by his covenants, and he cannot shelter himself by saying that the workmen neglected their duty. No equitable ground is thereby afforded for relieving against the legal consequences of the breach of the covenant (4). It is a clear principle that if there be breaches of several covenants in a lease, and there be any one of them with respect to which there exists no equitable ground for relief, although there may be as to all the others the most unquestionable right to relief in Equity; a Court of Equity will not interfere to prevent a lessor from recovering in an action of ejectment founded on those breaches (5). A tenant cannot be allowed to dispute his landlord's title, therefore if a lessee is proceeded against in ejectment by a claimant who disputes the title of the landlord, and is also threatened with distress by the landlord, the tenant cannot restrain either the ejectment by the claimant, or the distress by his landlord (6).

10. A Court of Equity will restrain an ejectment under a deed of appointment obtained by a husband from his wife by undue influence, oppression, &c. (7).

11. A surviving partner will be restrained from proceeding by

(1) *Bamford v. Creasy*, 3 Giff. 675, 693.
681.

(2) *Bargent v. Thompson*, 4 Giff. 473; 9 Jur. (N. S.) 1192; 7 L. J. (N. S.) 365.

(3) *Nokes v. Gibbon*, 3 Drew. 681,

(4) *Ib.*

(5) *Ib.*, *et vide Lovat v. Ranelagh*, 3 V. & B. 24.

(6) *Homan v. Moore*, 4 Price, 5.

(7) *Peel v. —*, 16 Ves. 157.

ejectment to obtain possession of property, of which a joint lease has been made to himself and his deceased partner (1).

12. Where there has been acquiescence by the owner of land in the construction of works on his land, the Court will restrain an action of ejectment by him to recover the land, upon the terms of the plaintiff giving judgment in the ejectment, and paying into Court a sum not less than the utmost valuation of the land (2).

13. Where there is fraud, concealment, and acquiescence, together with conduct which creates an estoppel, a Court of Equity will restrain an ejectment by the party guilty of this conduct (3).

14. An ejectment will be restrained on the ground of equitable estoppel or implied trust (4). So an ejectment by an owner who has stood by, or has actively promoted the construction of works upon his land, or who is in a fiduciary position, will be perpetually enjoined, and the value of the land will be ascertained (5). So, if by consent, a party has, in Equity, sanctioned the formation of a canal, he will not be entitled to obtain possession of the land covered by the canal, but only to a fair compensation for the value of the land. And persons who have purchased the property with notice, as to the canal, are equally bound by the same equity (6). Acquiescence by lessors in, with knowledge of, breaches of covenant, and receipt of rent, will deprive them of their right to proceed to recover possession immediately, and the lessees will be entitled to a reasonable time for restitution of works which have been abandoned by them (7). If the proceedings and conduct of a party are tantamount to a waiver of a right to curtesy out of estates, he will not be entitled to an injunction to restrain an ejectment (8).

15. If a lease is made which is not warranted by a power to make leases, but it is ratified and confirmed in Equity, by the party who would otherwise be entitled to the possession of the lands demised, a Court of Equity will restrain an ejectment by

(1) *Elliot v. Brown*, 3 Sw. 489.

(5) *Ib.*

(2) *Powell v. Thomas*, 6 Hare, 300.

(6) *Beaufort (Duke of) v. Patrick*, 17 Beav. 60; 17 Jur. 682.

(3) *Leary v. Rose*, 10 Upper Canada Law Journal, 272 (Ch.).

(7) *Whitehead v. Bennett*, 9 W. R. 626; 4 L. T. (N. S.) 818.

(4) *Trenton, &c. v. McKelway*, 4 Halst. (Ch.) 84 (Amr.).

(8) *Stone v. Godfrey*, 18 Jur. 524.

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that party, and compel him to confirm the lease (1). If a party has derived an estate as heir to an ancestor, he is bound to make good the covenants in a lease by the ancestor, and will be decreed to make a renewal of the lease, in pursuance of a covenant to renew for ever (2). If a lease for lives renewable for ever expires without renewal, and the landlord brings ejectment, the tenant ought not to dispute his title, but give consent for judgment and file a bill for renewal (3).

16. Though lessees of a mine admit the forfeiture of the lease at Law, by reason of breaches on their part, of covenants; yet if there is evidence that after the breaches, the lessor's agent encouraged them to lay out money on the premises, and if there is in other respects, a presumption that at the hearing they may be entitled to equitable relief, the Court, considering that the inconvenience of allowing an ejectment to proceed, would far exceed that of stopping the action until the hearing, will grant an injunction upon an interlocutory application (4). And it would seem that where a landlord is aware that a lease is or must be forfeited, and allows the tenant to go on spending money on the property, the landlord will be restrained from availing himself of the forfeiture at Law (5). The Court will restrain an action of ejectment on a balance of convenience and inconvenience, and where there is also the fact that the breach can easily be repaired, as where a covenant not to build without the consent of the lessor, has been broken, but only to a small degree (6).

17. Upon a bill of discovery in Equity, in aid of an action, the plaintiff is only entitled to a discovery of such matters as make out his own title, and cannot compel a discovery of the particulars of his adversary's title, and how he makes it out. Therefore a defendant in an action of ejectment is not entitled to a discovery in Equity, under what title the plaintiff claims at Law, or how he makes it out (7). Yet if a plaintiff allege seisin of his father for many years before his death, and his death and will, and posses-

(1) *Gray v. Knox*, 5 Ir. Eq. Rep. 465.

and *Coal Co. v. Camoys (Lord)*, 11

(2) *Beere v. Cavendish*, 5 Ir. Eq. Rep. 472.

Jur. (N. S.) 555; 12 L. T. (N. S.) 780.

(5) *Ib.*

(3) *Wallace v. Patten*, 1 Ir. Eq. Rep. 338.

(6) *Haigh v. Waterman*, 16 L. T. (N. S.) 375.

(4) *North Staffordshire Steel, Iron,*

(7) *Ingilby v. Shafto*, 33 Beav. 31.

sion under that will ever since; and that the defendant for the first time raised a claim to the premises, thirty-three years after the death of the father, through certain persons, and that the plaintiff could not discover if any such person had ever been interested in, or connected with, the premises, the Court will grant an injunction to restrain an ejectment by the defendant until answer to a bill of the plaintiff for discovery of the character or right in which, and the persons through whom, the defendant claims, and of the nature and particulars of his claim and how he makes it out (1).

18. If there has been a waiver by a mortgagee, of default by the mortgagor, a Court of Equity will restrain an ejectment by the mortgagee (2).

19. The tenant must be made a party to a bill to restrain an ejectment unless the landlord has been admitted to defend the action (3). But the Court will refuse an injunction to restrain execution upon a judgment in ejectment obtained by one of two defendants against the other defendant, where the plaintiff, as landlord, might have made himself defendant at Law to the action of ejectment brought against his tenant (4).

20. If a decree has been made in favour of the plaintiffs in a suit for establishing the trusts of a will, the Court will grant an injunction to restrain an action of ejectment against them for the purpose of disputing the will, by persons claiming an adverse interest to the plaintiffs (5). A Court of Equity will restrain an action of ejectment by the heir-at-law against a devisee, in whose favour a verdict has been given, in which a copy of the will was received in evidence, and the will has been established by the Court according to the copy (6).

21. In case of a trust estate devised to be sold or devised to a devisee, if the will is disputed, after two trials by direction of the Court, in which the verdicts are in favour of the will, Equity will grant a perpetual injunction (7). And though the title be purely

(1) *Garle v. Robinson*, 3 Jur. (N. S.) 633.

(2) *Langridge v. Payne*, 2 J. & H. 423.

(3) *Poole v. Marsh*, 8 Sim. 528; *Lawley v. Walden*, 3 Sw. 142.

(4) *Moses v. Lewis*, Jac. 502.

(5) *Turner v. Turner*, 19 L. J. (N. S.) Ch. 352.

(6) *Davie v. Evans*, 4 De G. & Sm. 440.

(7) *Leighton v. Leighton*, 1 P. Wms. 671; 4 Bro. P. C. 378; 1 Str. 404.

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legal, and there is no ingredient of trust, fraud, accident, &c. in the cause, yet where the plaintiff has had five verdicts in ejectment at Law, a Court of Equity will decree a perpetual injunction (1). And it will do so where the defendant has brought five ejectments, and has been nonsuited upon full evidence in three of them, and has had verdicts against him in the other two (2). A party who has suffered a decree which debars his right to an estate, to be enrolled, will be stayed by a perpetual injunction from bringing an ejectment, till the decree is reversed (3).

Possession.

22. A Court of Equity will not restrain proceedings to recover possession against a plaintiff who, pending a suit to establish his equitable title, gets into possession tortiously (4). If a succession of occupiers of waste land in a colony permit one another to continue in undisturbed possession for fifty years, the representatives of the first lawful possessor have no longer the power to bring trespass—acquiescence is a sufficient answer (5).

23. If the result of an ejectment shews that the defendant in the ejectment has been in possession of a piece of woodland for more than twenty years, although the action is discontinued, the defendant in the action is entitled to an injunction to restrain the cutting of trees in the wood by the plaintiff in the action, in order to assert his alleged right (6).

SECT. 2. *Rent—Executions.*

Rent.

1. A landlord cannot restrain proceedings on a judgment in an action for excessive distress, on the ground that rent and dilapidation-money have subsequently become due from the tenant (7). Pending an interpleader suit to determine the rights of defendants to the rent of premises occupied by the plaintiff, the Court will

(1) *Bath (Lord) v. Sherwin*, 4 Bro. P. C. 373; Prec. Ch. 261; Gilb. Eq. Rep. 2. (5) *Humphrey v. Nowland*, 6 L. T. (N. S.) 116.

(2) *Barefoot v. Fry*, Bun. 158. (6) *Stanford v. Hurlstone*, L. R. 9

(3) *Selby v. Selby*, Dick. 678. (N. S.) 140. Ch. 116; 22 W. R. 422; 30 L. T.

(4) *Grafton v. Griffin*, 1 Russ. & My. 336. (7) *Maw v. Ulyatt*, 31 L. J. (Ch.) 33.

restrain proceedings at Law for payment of the rent, and order it to be paid into Court (1).

2. If a party decrees to restrain proceedings at Law upon judgment, after an execution has been issued, the amount marked on the writ and the costs at Law must generally be lodged in Court, or satisfactorily secured (2).

3. A Court of Equity will not extend the benefit of a waiver by a lessor, of breaches of covenant by his lessee, to sub-lessees holding under the lessee, and will not stay the execution of a writ of possession upon a judgment in ejectment obtained by the lessee against his sub-lessee (3). The Court will, at the suit of a purchaser, restrain a judgment creditor from taking out execution on his judgment, against an estate sold before he had obtained the judgment, but ineffectually conveyed to the purchaser, whereby the legal estate had descended, since the judgment, to the heir-at-law (4).

4. Where the principal subject in dispute is the locality of lands, which have been intermixed and confused while occupied by one person, an ejectment does not decide anything, nor inform the Court of the material point, namely the locality of the lands; therefore the Court, in such a case, will restrain the plaintiff at Law from taking out execution on a verdict found for him in ejectment, so as to choose his own part of the lands (5).

SECT. 3. *Lease—Forfeitures—Covenants.*

1. A lessee of a colliery at a rate of so much per wey will, if the colliery become not worth working, upon offering to pay for all the coal that can be got, be relieved against the future rent, and from a covenant in the lease to work the colliery, and actions for the rent and for breach of the covenant, will be restrained (6). A Court of Equity must forget its name if it did not interfere in a

Lease.

(1) *Glover v. Reynolds*, 16 L. T. (N. S.) 113.

(2) *Rogan v. Weir*, San. & Sc. 677.

(3) *Hillier v. Parkinson*, 9 L. J. (Ch.) 156.

(4) *Prior v. Penpraze*, 4 Price, 99.

(5) *Hurdcastle v. Shafto*, 1 Anstr. 184.

(6) *Smith v. Morris*, 2 Bro. C. C. 311, 315.

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case so circumstanced; but if any possible disadvantage could arise to the lessor, the Court would not interfere; it is true if parties enter into coal contracts they are bound to fulfil them; but if parties enter into contracts which are enforced for purposes of harass and vexation, Courts of Equity properly interfere; the offer in such a case, to pay the lessor all he could ever obtain, without incurring the expense, is offering him everything he can fairly require (1). But if there is a fixed sum a year to be paid as rent whether the mines are worked or not, the Court cannot relieve the lessee from the payment of that sum (2).

Forfeitures.

2. A Court of Equity has, under circumstances raising an equity, power to relieve a tenant from the forfeiture of a lease, for a breach of a condition against assigning or sub-letting without the lessor's consent in a certain form; as, for instance, where the consent is given in another form, and the lessee, or his personal representative, is advised and encouraged by the lessor or those claiming under him, to make the sub-lease, and the lessor, or those claiming under him, stand by while a large sum is expended on the lands by the sub-lessee, and witness the execution of the lease (3).

Covenants.

3. Where some of the covenants in a lease (other than a covenant to pay rent) have been broken, if any covenant against which relief does not lie, has been broken, though the rest may not have been broken, yet the Court will not relieve against ejectment for the nonpayment of rent (4).

4. An action on breach of covenant to repair, will be restrained under peculiar circumstances not amounting to neglect or surprise, and where there has been no waiver or abandonment on the part of the defendant (5).

5. The Court will restrain an action on a covenant against sub-lessees or their assignees, by the sub-lessor, to recover an exorbitant premium paid by the sub-lessor under an erroneous belief that the premises were used for a hazardous trade, upon the plaintiffs undertaking to pay the amount of premium found to be properly

(1) *Smith v. Morris*, 2 Bro. C. C. 311, 315, *et vide* *Ridgway v. Sneyd*, 1 Kay, 627.

(2) *Phillips v. Jones*, 9 Sim. 519; *et vide* *Ridgway v. Sneyd*, *supra*.

(3) *Burke v. Prior*, 15 Ir. Ch. Rep. 106.

(4) *Nokes v. Gibbon*, 3 Drew. 681.

(5) *Hannam v. South London Waterworks Co.*, 2 Mer. 65.

payable (1). Although a Court of Equity will not interfere to modify a strict contract to insure against fire by a lessee, where, by breach of it, the lessor may enter, it being for the interest of all parties that a sacred regard should be had to the strict obligations of the contract (2); yet if leases have been dealt with by the lessor and lessee, so as to lead the lessee to suppose the forfeiture would not be insisted upon, before any insurance had been effected by the lessee, the lessor will be restrained from taking proceedings in an action of ejectment, subsequently brought against the assignee of the leases, to recover possession of the property, on the ground that the covenants had been broken in several respects, but without prejudice to the defendant's right to sue in respect of any further breaches of the covenant (3).

6. Whether covenants run with the land or not, a purchaser with notice of them will be restrained from violating them (4). A grantee of land with notice of an easement in a third party, will be enjoined from proceeding in an action upon the covenants in the warranty deed of the land, and from using the warranty and its covenants as evidence for the purpose of enforcing any claim upon his covenants (5).

7. A Court of Equity has, upon the ground of vexation by repeated actions for breach of covenant, jurisdiction to restrain an action (6).

8. Notwithstanding a mortgagee with power of sale has contracted to sell a portion of his security, for a sum exceeding the amount due to him, he will not be restrained from enforcing by action the covenant for payment (7). A Court of Equity will relieve a mortgagor from an action on a covenant executed by him in ignorance of the facts and without consideration (8).

(1) *Leather Cloth Co. v. Bressey*, (Amr.)
3 Giff. 474.

(2) *Meek v. Carter*, 4 Jur. (N. S.)
992.

(3) *Ib.*

(4) *Coles v. Sims*, 5 De G. M. & G.
1; 1 Kay, 56.

(5) *Taylor v. Gilman*, 25 Vt. 411

(6) *Waters v. Taylor*, 2 V. & B.
302.

(7) *Willes v. Levett*, 1 De G. & Sm.
392.

(8) *Wall v. Cockrell*, 9 Jur. (N. S.)
447.

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SECT. 4. *Nuisance.*

1. Though where a party allows and acquiesces in the erection of a nuisance, he will be stayed in his action at Law (1); yet, acquiescence in the erection and carrying on of works likely to become a nuisance, so long as no perceptible injury is sustained, will not preclude parties from objecting to an extension of the works, or from pursuing their legal remedy to recover damages for injury sustained by such works, when injury arises (2).

SECT. 5. *Annuities—Mortgages.*

Annuities.

1. A Court of Equity will stay an action for arrears of an annuity, on a bill by the grantor for an injunction and an account of what is due (3).

Mortgages.

2. A Court of Equity will restrain a mortgagee from recovering at Law the difference between the mortgage debt and the purchase-money of the sale, after a foreclosure and sale of the mortgaged estate (4).

3. A mortgagee cannot effectually, in Equity, without the concurrence of the mortgagor, release a vendor from whom the mortgagor purchased the estate mortgaged, from his covenant for quiet enjoyment: and the vendor will, at the suit of the mortgagor, be restrained from setting up the conveyance by way of mortgage to the mortgagee, or an accord between the vendor and mortgagee, in discharge of the covenant for quiet enjoyment, as a defence to an action by the mortgagor on the covenant (5).

4. If a mortgagee so deal with a mortgaged estate as to render it impossible for him to restore it on full payment, a Court of Equity will prevent him from suing at Law to recover the mortgage money (6). The Court will not, at the suit of a mortgagor

(1) *Anon.*, 2 Eq. Abr. 522.

(4) *Perry v. Barker*, 8 Ves. 527.

(2) *Bankart v. Houghton*, 5 Jur. (N. S.) 282.

(5) *Thornton v. Court*, 5 De G. M. & G. 293; 17 Jur. 151.

(3) *King v. Chaplin*, 9 Jur. (N. S.) 984; *vide Scarle v. Carpenter*, Amb. 242.

(6) *Palmer v. Hendrie*, 28 Beav. 341; 27 Beav. 349.

to redeem, who is placed by the circumstances of the case in such a position that his mortgagee is, with regard to him, an unliquidated mortgagee—interfere by injunction to prevent the mortgagee from pursuing his legal remedy by ejectment to get possession of the mortgaged premises from the mortgagor; as, for instance, in a case where the object of the mortgagee is to enable himself to complete a contract for the sale of the estate made by him under a power of sale in the mortgage (1). A mortgagee is, as an unliquidated mortgagee, entitled to pursue his legal remedy to get possession of the mortgaged premises (2). A Court of Equity will restrain an equitable owner of property from proceeding in an action for damages in the name of the legal owner, if the liability for the damages was caused by the equitable owner; in such a case there would be no defence to the action, from its having been commenced in the name of the legal owner (3).

5. The assignee of a mortgagee cannot stand in any different character, or hold any different position from that of the mortgagee himself, although the mortgagor may not have been a party to the assignment. Every mortgagor has the right to have a reconveyance of the mortgaged property upon payment of the money due upon the mortgage; and the mortgagee is charged with the duty of making such reconveyance upon such payment being made. And if the debt and security have been improperly severed, as by transferring the mortgage without assigning collateral securities, although it is not necessary to say, that in no case can the mortgage debt be severed from the security for that debt; yet if there is a question upon the point, proper to be determined upon the hearing of the cause, a Court of Equity will grant an injunction to restrain a mortgagee from proceeding at Law upon the collateral securities given by a mortgagor for the mortgage debt, pending a suit in Equity by the mortgagor to redeem and settle the equities of the parties (4). If two properties are mortgaged to the same person for distinct sums, a surety for one of the properties cannot restrain the mortgagee from proceeding at Law, upon offering to pay the sum for which he is surety, the

(1) *Davies v. Williams*, 7 Jur. 663.(3) *Causton v. City Offices Co.*, 12(2) *Ib.*;

Jur. (N. S.) 497; 14 W. R. 999.

(4) *Walker v. Jones*, L. R. 1 P. C. 50.

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property is not redeemable by the surety unless upon his payment of both sums (1). The right of the mortgagee to retain all the securities until repaid for both debts, overrides the right of the surety to have the benefit of the securities for that debt for which he is surety (2).

SECT. 6. *Vendor and Purchaser, Specific Performance.*

1. It is not the course of a Court of Equity, when it entertains jurisdiction in specific performance, to permit an action at Law to proceed for the same subject matter (3). After a decree for specific performance has been made against a defendant, the plaintiff cannot proceed by an action at Law on the contract for damages (4). Where the Court grants relief in a suit for specific performance, it has jurisdiction over the whole matter, and can therefore deal with any question of damages arising from a breach of the agreement (5). A plaintiff who comes to a Court of Equity for its aid, is bound to put under the control of the Court, his legal rights relating to the subject-matter of litigation (6). An offer to sell land, to be binding upon the person making it, must be accepted within a reasonable time; and if the person making the offer die, become bankrupt, or sell, before acceptance of the offer, the land is not bound, and the Court will not stay proceedings at Law to recover the land from the person who has so neglected to accept the offer (7). If the description in printed particulars of sale is calculated grossly to deceive, as to the real nature and value of the estate sold, a Court of Equity will not grant an injunction to stay proceedings in an action brought by the purchaser to recover the amount of his deposit (8). Notice by a vendor of an intention to re-sell is equivalent to a declaration that he will not seek specific performance, and the Court will not restrain an action by the pur-

(1) *Farebrother v. Wodehouse*, 23 Beav. 18; 2 Jur. (N. S.) 1178.

(2) *Ib.*

(3) *Beaufort (Duke) v. Glynn*, 3 Sm. & Giff. 213.

(4) *Reynolds v. Nelson*, 6 Madd. 298.

(5) *Prothero v. Phelps*, 2 Jur. (N. S.) 173.

(6) *Ib.*

(7) *Meynell v. Surtees*, 1 Jur. (N. S.) 80, 737.

(8) *Stewart v. Alliston*, 1 Mer. 26.

chaser for the deposit-money (1). If there is evidence of the abandonment of the contract by the vendor, from his conduct by delaying completion, the Court will not restrain an action for the deposit (2). Though the vendor retain possession of the estate, the Court will not, in a suit by him for specific performance, compel him to pay the deposit money into Court, if the delay in the completion of the contract is occasioned by the purchaser (3). Still it will, in such a case, restrain an action by the purchaser against the vendor to recover the deposit (4). The Court will restrain an action for the purchase-money by the vendor, where the vendor has required the purchase to be completed in a mode which he was not justified in insisting upon (5).

2. Where there is an agreement to hold for two years with the option of purchasing, upon a bill against the landlord for specific performance of the contract of sale, the Court will not restrain the landlord if he afterwards commence an action of ejectment against the tenant, except upon the terms of the plaintiff undertaking to continue to pay the rent, or, in lieu of the undertaking, the plaintiff pay the purchase-money into Court (6). If a vendor, under the conditions, duly annuls a contract of sale, the Court will cancel a conveyance by the vendor, and decree a reconveyance of the property to him, and will restrain actions by the purchaser (7). A party who has commenced an action in respect of a portion of a contract, cannot set up in Equity, in a suit by the other party to the contract for specific performance and to restrain the action, the defence of an alleged previous waiver of the contract (8).

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| (1) <i>Royou v. Paul</i> , 28 L. J. (Ch.) 468. | (6) <i>Pyke v. Northwood</i> , 1 Beav. 555. |
| (2) <i>Lloyd v. Collett</i> , 4 Bro. C. C. 152. | (7) <i>Hudson v. Temple</i> , 3 L. T. 469; 4 Ves. 689, n. (b). |
| (3) <i>Wynne v. Griffith</i> , 1 S. & S. 147. | (8) <i>Whittaker v. Fox</i> , 13 L. T. (N. S.) 588. |
| (4) <i>Ib.</i> | |
| (5) <i>Viney v. Chaplin</i> , 2 De G. & J. | |

CHAPTER II.

THE DOCTRINES AND PRINCIPLES IN RESTRAINING PROCEEDINGS
IN COURT OF LAW AND OTHER COURTS AS APPLICABLE TO
PERSONAL PROPERTY.

PART II.

SECT. 1. *Choses in Action—Policies—Bills of Exchange—Promis-
sory Notes, I. O. U.s—Bonds—Guaranties, Legal Instruments—
Judgments.*Choses in
action.

1. A chose in action not being assignable at Law (1), an assignee thereof takes it subject to all the equities which attach to it; therefore a purchaser of a debt, who brings an action to recover it in the name of the assignor, to which the debtor pleads a parol agreement between him and the assignor by way of set-off, has no title to relief in Equity, as the questions are exactly the same at Law and in Equity, and the rules which apply to both questions, as to the set-off and the defence, are exactly the same (2). Though the purchase of a chose in action be *bonâ fide* for value without notice, yet, as a chose in action is not assignable at Law, the purchaser must take it subject to the equities attaching to it; and if it be tainted with fraud in its origin, the purchaser will be restrained from suing on it (3). A vendee of land, who has given a note to the vendor for the purchase-money, upon a bond by the vendor to make a title, is entitled to be relieved against an action by an assignee of the note, if the payee is unable to make a title (4).

Policies.

2. A party is entitled to file a bill for discovery of fraud in a policy of insurance, to defend an action at Law, and to ask that the policy may be delivered up to be cancelled (5). The non-

(1) See "The Supreme Court of Judicature Act" (36 & 37 Vict. c. 66, s. 25 (6), which makes the assignment of debts and other legal choses in action effectual in law to pass and transfer the legal right to such debts and choses in action.

(2) *Rolt v. White*, 31 Beav. 520; 9 Jur. (N. S.) 843.

(3) *Athenæum Life Insurance Society v. Pooley*, 3 De G. & J. 294.

(4) *Black v. Bowman*, 4 Eng. 501 (Amr.)

(5) *French v. Conolly*, 2 Anstr. 454.

communication of a fact which vitiates a policy of insurance, entitles the grantors of the policy to restrain proceedings at Law upon it by the assignees thereof, and to have it delivered up to be cancelled. The jurisdiction of a Court of Equity in cases of this kind is clear. Such a Court has concurrent jurisdiction in such cases with a Court of Law, and will not decline to decide them, and to restrain actions on them, on the ground that they can be decided at Law (1). But although a bill has been filed to set aside a policy on grounds of fraud, a Court of Equity will not restrain an action by an assignee of the policy, where the question as to the fraud is one for a Court of Law with the aid of a jury—as for instance, whether the assured was of sober habits (2). Neither will Equity entertain a suit for the repayment of premiums where a Court of Law is the proper tribunal to decide the question—as for instance, where the plaintiff has made an advance upon forged bills of lading for a cargo, insured by the forger, and claims repayment of the premiums on the policy, on the ground of no interest having attached (3). If the owner of a building insure it against fire, but not to the full value, and the building is burnt by the carelessness of the servants of a third party, so as to render that party liable, the insured is entitled to bring an action for the whole loss to himself, including that part of the loss against which he is indemnified by the insurance company; the insured is *dominus litis*, subject to liability for anything which would be a breach of some equitable obligation, or a violation of some equitable duty towards the insurers, cast upon the insured by reason of the circumstances of the case (4).

3. Fraud practised on an acceptor of a bill of exchange, in order to obtain his acceptance, is no defence against an indorsee for value; and fraud being a good defence at Law to an action on a bill of exchange, there is no ground for seeking relief in Equity; and a Court of Equity will not restrain the indorsees from enforcing at Law payment against the acceptor (5). But if a bill is

Bills of exchange.

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| (1) <i>British Equitable Insurance Co. v. Great Western Railw. Co.</i> , 38 L. J. (Ch.) 132, 314; 17 W. R. 43, 561; 19 L. T. (N. S.) 476; 20 L. T. (N. S.) 42. | (Ch.) 273. |
| (2) <i>Life Assurance of Scotland v. McBlane</i> , 9 Ir. R. Eq. 176. | (4) <i>Commercial Union Assurance Co. v. Lister</i> , L. R. 9 Ch. 483, 484, 486; 43 L. J. (Ch.) 601. |
| (3) <i>Hoskins v. Holland</i> , 44 L. J. | (5) <i>Thiedman v. Goldschmidt</i> , 1 De G. F. & J. 4; 1 Giff. 142; 1 L. T. (N. S.) 50. |

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filed for discovery and an injunction to stay proceedings at Law, and for delivery up of a bill of exchange to be cancelled on the ground of fraud, which is not answered by some of the defendants; if the discovery might disclose a defence in Equity, of which the plaintiff in Equity could not avail himself at Law, although the Court will refuse to stay proceedings, it will grant an injunction to stay execution (1). A purchaser, and *bonâ fide* holder of a bill of exchange for value, though obtained surreptitiously, and put into circulation by means of a forgery—if there be nothing to excite suspicion of forgery—is legally entitled to the bill, and a Court of Equity will not interfere to defeat his title, by restraining him from suing upon the bill (2). If an action has been brought on a bill of exchange alleged to have been fraudulently obtained, and the plaintiff has elected to be nonsuited; unless he undertake to bring another action, the Court, if satisfied that an inference of fraud is to be drawn, will order the bill to be delivered up (3). If a bill of exchange, accepted by a party who refused to receive the consideration for the bill as having been improperly sent, is sent by the drawer, an agent, to his principals, and by them to their bankers to sue on it; the bankers, although they deny all knowledge of the circumstances under which the bill was accepted, if there is ground for suspecting the truth of the denial, will be restrained from proceeding in an action on the bill (4). The plaintiff having accepted the bill in anticipation of the consideration being realised—in this case cotton of a certain description—is entitled to be protected from the payment of the bill upon the non-realisation of the consideration. The bankers, had they been *bonâ fide* holders for value of the bill, would have had a title of their own, independently of the equities that might exist between the drawer and acceptor, but it is impossible for a Court of Equity to admit the right of a party claiming against a title, or an equity existing between a drawer and acceptor; if there is proof, or strong reason for suspecting, that the party does not hold that

(1) *Houlditch v. Nias*, 8 Price, 689.

(3) *Allen v. Davis*, 4 De G. & S.

(2) *Dawson v. Prince*, 2 De G. & J.

133; 20 L. J. (Ch.) 44.

41; 27 L. J. (Ch.) 169; 4 Jur. (N. S.)

(4) *Sharp v. Arbuthnot*, 13 Jur. 160, 219.

497; 3 Jur. (N. S.) 903; 26 L. J. (Ch.)

849.

character which he professes to hold, and that he is not a *bonâ fide* holder for value, without notice of the equities between the drawer and acceptor.

4. A Court of Equity will restrain actions on bills of exchange given for gambling debts (1). So it will restrain an action on a promissory note given as a consideration for the renewal of bills of exchange, the acceptances to which have been obtained under circumstances amounting to an undue use of a superiority in official rank, and merely for the accommodation of the superior officer (2). An acceptor of a bill of exchange, as a surety for the drawer, is released in Equity, if not at Law, by the giving of time to the drawer, the principal debtor; and is entitled to an injunction to restrain proceedings at Law by the indorsees, creditors with notice that the acceptance was for the drawer (3).

5. An injunction will not be granted to restrain an action on a bill of exchange, on circumstances which merely shew a right to a counter-action for damages, respecting the subject matter which was the consideration for the bill (4).

6. The object of the bankrupt laws being to secure an equal distribution of the bankrupt's property among his creditors, a Court of Equity will, on the ground of public policy, set aside a secret bargain between a bankrupt and one of his creditors, and will therefore restrain proceedings in an action on a bill of exchange, given by a bankrupt to one of his creditors, as a preferential and secret consideration, to obtain their consent to annul the adjudication, and will order the delivery up of the bill to be cancelled, as illegal and void (5).

7. A plaintiff in action at Law on a bill of exchange, may institute a suit in Equity to rectify the bill by striking out the name of the plaintiff, inserted by mistake as the drawer; and the Court

(1) *Portarlington (Lord) v. Soulby*, 3 My. & K. 104.

(2) *Lloyd v. Clark*, 6 Beav. 309.

(3) *Davies v. Stainbank*, 6 De G. M. & G. 679.

(4) *Glennie v. Imri*, 3 Y. & C. 436; 3 Jur. 432 (see the Rules of Court under the "Supreme Court of Judicature Act, 1873," 36 & 37 Vict. c. 66,

Order 19 (3), by which a defendant may set off any right or claim whether sounding in damages or not, subject to the decision of the Court whether such set-off ought to be allowed).

(5) *Mare v. Sandford*, 5 Jur. (N. S.) 1339; 1 Giff. 288; *et vide Constantein v. Blache*, p. 384; *Mackenzie v. Mackenzie*, p. 386, *post*.

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will restrain the defendant from alleging in the trial that the plaintiff was, jointly with himself, or otherwise, a drawer of the bill, and from issuing execution under any judgment he may obtain in the action, without leave of Court; on the grounds of the non-admissibility of evidence in the action by the plaintiff at Law, to prove the real contract, and of the established jurisdiction in Equity to correct mistakes in documents (1). If a person lend his name, as maker of a note, to enable the borrower to keep up a false credit, by using the paper as business paper, he cannot come into Court for relief against the consequences (2).

8. The maker of a note for a consideration which fails, is not entitled to an injunction against the assignee of the payee of the note to restrain proceedings upon a judgment obtained by the assignee against the maker; but the consideration having failed, the payee of the note is liable to the maker for the note he assigned, whenever the maker shall pay the judgment; or the payee shall be otherwise released from his liability to the assignee (3).

Promissory
notes,
I. O. U.'s.

9. A Court of Equity will restrain the holder, indorsee of a promissory note drawn by a plaintiff, where the holder takes the note long after it is overdue, from proceeding in an action for payment, on the terms of the plaintiff giving judgment to be dealt with as the Court should direct (4). In such circumstances, the holder takes it subject to all the equities by which it is affected; and if there is a question of accounts to be settled between the maker of the note and the payee, to secure the balance of which the note was given, that question must be settled, and the balance ascertained (5).

10. Notwithstanding the general rule, that the onus is on the maker of a negotiable instrument to shew that it has been paid, the holder is bound, in the first place (unless he be a derivative indorsee for value during the currency of the bill or note), to show that the maker received value for it; and persons who pay money

(1) *Druiff v. Parker* (Lord), L. R. 5 Eq. 131; 37 L. J. (Ch.) 241; 18 L. T. (N. S.) 46; 16 W. R. 557.

(2) *Davenport v. City Bank*, 9 Paige, 2 (Amr.).

(3) *Drake v. Lyons*, 9 Gratt. 54 (Amr.).

(4) *Simons v. Cridland*, 5 L. T. (N. S.) 523.

(5) *Ib.*

to a party acting *in loco parentis*, by the directions of persons of tender years, although of age, should see that such persons understand the nature of the transaction, and that they have had independent advice; in default of these precautions, a Court of Equity will restrain any action upon securities so obtained, and declare them to be invalid, except as to such sums as the parties giving the securities under such circumstances, actually have received (1). So the maker of a promissory note obtained by an abuse of confidence, or by undue influence, will be relieved against his liability thereon, and the note will stand as a security only for the amount due from him (2). And though the plaintiff in Equity may have an equitable as well as a legal defence to the action on the note, he is not bound, after filing his bill, to go into evidence at the trial at Law, to establish his legal defence, but he may rely on his case in Equity (3). The Court will restrain an action upon an I. O. U. obtained in part payment of the consideration of a contract, into which the owner of the I. O. U. has been induced to enter by fraudulent misrepresentation, and will direct the contract to be delivered up to be cancelled (4). The Court will restrain an action upon promissory notes to secure the amount of a mortgage debt, brought by the mortgagee after he has received his mortgage debt, and will direct them to be delivered up (5). The Court will restrain an action by the depositor of a promissory note, brought against the giver of the note, if the note has been discharged by the payee, in the course of his dealings with the depositor, and if necessary, the Court will direct an inquiry whether sums paid to the depositor by the payee were paid with specific appropriations to the payment of the note (6). The position of the maker of the note is that of surety to the depositor, the payee being the debtor and principal if the money was lent to him (7).

(1) *Dettmar v. Metropolitan and Provincial Bank*, 1 H. & M. 641; 10 L. T. (N. S.) 63; *et vide Espey v. Lake*, 10 Hare, 260; *Maitland v. Irving*, 15 Sim. 537.

(2) *Billage v. Southee*, 9 Hare, 534; S. C. *sub nom. Billing v. Southee*, 21 L. J. (N. S.) Ch. 472.

(3) *Ib.*

(4) *Bartlett v. Salmon*, 1 Jur. (N. S.) 277.

(5) *Robinson v. Brocklebank*, 12 W. R. 331.

(6) *Mostyn v. Burdekin*, 3 Jur. 52.

(7) *Ib.*

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11. A Court of Equity will restrain a defendant from proceeding at Law on a promissory note given by the plaintiff, when insolvent, to one of his creditors who had refused to come in under a creditors' composition deed, unless the plaintiff gave his promissory note for the remainder of the debt due to himself (1).

Bonds.

12. If it is doubtful whether an agreement for giving time was made by the obligee of a bond with a surety, either as principal or as surety, an injunction to stay proceedings against a co-surety will be continued (2). Where an injunction has been obtained to restrain proceedings in an action on a bond, in which the plaintiff joined as a surety, on the ground of misrepresentation on the part of the obligee, and a deviation by him, with the concurrence of the principal obligor, from the terms of the contract on which the bond was founded; and it appears on the evidence that there is reason to suppose that there has been such misrepresentation and deviation, although the evidence is not conclusive on the point, the Court will not dissolve the injunction (3). A surety who has executed a bond on the faith of its being executed by the principal debtor, will not be relieved against the execution of a Common Law judgment upon the bond on the ground that the principal has not executed the bond, if the principal has executed an instrument on which the surety may sue him and become a specialty creditor of his. If the surety can have the benefit of an agreement under seal between the principal and the obligee of the bond, he is not discharged by the non-execution of the bond by the principal debtor, and upon properly indemnifying the obligee, the surety will be able, in his name, to sue the principal upon the above agreement, and become a specialty creditor of his just as much as if he had executed the bond (4). And further, if the plaintiff (the surety) has raised at Law the same case as set up in Equity, and the question has been decided by the judgment at Law, a Court of Equity will not restrain execution upon the judgment, as the doctrine of principal and surety is the same at

(1) *Constantein v. Blache*, 1 Cox, 287; *et vide Mare v. Sandford*, p. 381, ante; *Mackenzie v. Mackenzie*, p. 386, post.

(2) *Blake v. White*, 5 L. J. (N. S.)

Ex. Eq. 8; 1 Y. & C. 420; 4 L. J. (N. S.) Ex. Eq. 48.

(3) *Allan v. Inman*, 7 Jur. 433.

(4) *Cooper v. Evans*, L. R. 4 Eq.

45; 15 W. R. 609.

Law as in Equity (1). The Court will restrain proceedings on a bond, assigned by the procurement of a surety, after the debt has been paid by him, but with the money of the principal, as a collateral security for a debt of his, the surety's own (2). The Court will restrain an action on a first bond where a second has been given on the understanding that the first was to be cancelled (3). If bonds are given to a vendor to secure the purchase-money of land, with a covenant by the vendor with the purchaser that the land would, in a certain time, sell for a certain price, and an indemnity by him to the purchaser therefor, and the vendor becomes insolvent and the land becomes depreciated greatly in value, while the bonds are in the hands of the vendor, even before the expiration of the time the obligor is entitled, on a well-founded apprehension of loss, to a bill, *quia timet*, for an injunction restraining the vendor from selling the bonds, but if he parts with them before his insolvency, the rights of third parties intervene, and they must be protected against loss through equities existing between the original parties (4). If one of two joint and several bond debtors is precluded, by the form of a joint action by the bond creditor against them, from setting off his separate debt, he is entitled to an injunction against the bond creditor's proceeding in the joint action (5). A Court of Equity will not restrain an action at Law on a bond, if the consideration can be pleaded at Law, in order to try whether it is corrupt (6). Equity will enjoin proceedings upon a bond conditioned for the receipt of the money, although there be a breach of condition, provided nothing be due (7). Equity will relieve against an action on a bond merely to secure a settlement, if it be satisfied in any way (8). The Court will relieve against a bond made in consideration of a payment which was never made (9).

13. Bonds in the nature of penalties will be relieved against, and an issue *quantum damnificatus* will, if necessary, be ordered (10).

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| (1) <i>Cooper v. Evans</i> , L. R. 4 Eq. 45;
15 W. R. 609. | (5) <i>Bradley v. Millar</i> , 1 Rose, 273. |
| (2) <i>May v. Harman</i> , 4 Bro. P. C.
156. | (6) <i>Thrale v. Ross</i> , 3 Bro. C. C. 57. |
| (3) <i>Whilmhurst v. Peerless</i> , 17
L. T. (N. S.) 313. | (7) <i>Peek v. Payne</i> , Ridg. 295. |
| (4) <i>Coster v. Griswold</i> , 4 Edw. Ch.
364 (Amr.). | (8) <i>Humphreys v. Humphreys</i> , 3 P.
Wms. 395. |
| | (9) <i>Osborne v. Havers</i> , Cary, 112. |
| | (10) <i>Errington v. Aynesly</i> , 2 Bro.
C. C. 341; Dick. 692. |

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14. A *bonâ fide* purchaser of a negotiable bond for value without notice, cannot be restrained from dealing with it (1).

15. A bond creditor who has concurred in a general resolution for a composition to be secured by notes, will, with reference to the interest of the other creditors, be restrained from taking execution in an action upon the bond for non-payment of the notes, beyond the term of composition (2).

Guaranties,
Legal instru-
ments.

16. Although there be a legal defence to an instrument, which, though invalid, is not invalid on its face, the instrument, for instance a guarantie for money payable by instalments, ought to be cancelled, on the ground that future actions might fail from the loss of evidence (3). The principle is this, if a legal instrument has stated on the face of it, the defect which makes it impossible to sue at Law, a Court of Equity will not interfere; but if a legal instrument has no defect on the face of it, but by reason of the circumstances connected with it, it would be inequitable to allow a person to proceed at Law upon it, or if there be a good legal defence, not appearing on the instrument itself, which the lapse of time may cause the person chargeable upon the instrument, from loss of the evidence necessary for his defence at Law, to be unable to make available; then a Court of Equity will interfere, and order the instrument to be delivered up to be cancelled. The Court orders such documents to be delivered up, in consequence of the danger that the lapse of time might deprive the party to be charged upon it of the means of defence (4).

Judgments.

17. It is a general rule that Equity will grant relief against a judgment which is against conscience, or the justice of which can be impeached by facts, or on grounds of which the party could not avail himself at Law, or of which he was prevented from availing himself by fraud, accident, mistake, or the act of the opposite party, without any negligence or fraud on his own part (5).

(1) *Ashwin v. Burton*, 11 W. R. 103; 9 Jur. (N. S.) 319.

(2) *Mackenzie v. Mackenzie*, 16 Ves. 372. *Vide Constantein v. Blache*, p. 384; *Mare v. Sandford*, p. 381, *ante*.

(3) *Cooper v. Joel*, 27 Beav. 313; 1 De G. F. & J. 240; *vide Simpson v. Lord Howden*, 3 My. & Cr. 102.

(4) *Ib.*

(5) *Kent v. Ricards*, 3 Md. Ch. Decis. 392; *Marnie & Co. v. Hodgson*, 7 Cranch, 332; *Lamb v. Anderson*, 1 Chand. 224; *Rowan v. Runnels*, 5 How. 134; *Moore v. Gamble*, 1 Stockt. 246; *Pollock v. Gilbert*, 16 Geo. 398; *Little v. Price*, 1 Md. Ch. Decis. 182 (Amr.); *Jarvis v. Chandler*, 1 T. & R. 319; *Earl of Oxford's Case*, 1 Ch. Rep. 1; *Toth*, 126.

A judgment obtained by collusion will be relieved against (1). Special equitable grounds for the interference of the Court must be shewn (2). Equity will prevent the inequitable use of a good judgment (3).

18. Negligence in setting up a defence at Law (4), or in suffering judgment to go against him (5), disentitles a party to relief in Equity. If neglect in pretermittting an opportunity of pleading at Law can be accounted for, a Court of Equity will restrain proceedings and judgment granted afterwards (6).

19. A Court of Equity has jurisdiction to restrain an execution upon a judgment against a defendant at Law, on the ground of a subsequent release by the plaintiff at Law of his claims under the judgment for a valuable consideration, paid by the defendant at Law (7).

20. An executor, who, in an action at Law by a creditor of the testator, has confessed assets and pleaded according to the truth of the case, is, when the assets are taken from him and administered in Equity, entitled to the protection of the Court against any personal liability under which he may be placed by the judgment against him (8).

SECT. 2. *Executions.*

1. Although a Court of Equity has jurisdiction to grant an injunction to restrain an action at Law, on the ground of legal, as well as of equitable fraud, and to determine the legal fraud; yet, when it is advisable, it will permit an action to proceed in order to determine the question of legal fraud, and restrain execu-

(1) *Isaac v. Humpage*, 1 Ves. J. 427; *Bargate v. Shortridge*, 5 H. L. C. 297; *Annesley v. Rookes*, 3 Mer. 226, n.

(2) *Rowe v. Wood*, 2 Sw. 234, n.; *Protheroe v. Forman*, 2 Sw. 227; *O'Mahony v. Dickson*, 2 Sch. & Lef. 400; *Bateman v. Willoe*, 1 Sch. & Lef. 205.

(3) *Garlick v. McArthur*, 6 Wis. 450 (Amr.).

(4) *Protheroe v. Forman*, 2 Sw. 227; *Bateman v. Willoe*, 1 Sch. & Lef. 205.

(5) *Williams v. Lee*, 3 Atk. 223; *Lansing v. Eddy*, 1 John. Ch. 50 (Amr.).

(6) *O'Neill v. Browne*, 9 Ir. Eq. Rep. 131.

(7) *Williams v. Roberts*, 8 Hare, 315.

(8) *Gaunt v. Taylor*, 2 Hare, 413, 419.

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tion only. And if the jury find that there was no legal fraud, the Court will afterwards enter into the consideration of the question of equitable fraud, and if it find none to exist will permit execution to be taken out (1).

2. If a creditor has got a judgment before the usual administration decree for an account, the ordinary rule is, that he may issue execution after the decree (2). A creditor who has obtained an administration decree, is not entitled to restrain the payment of the proceeds of an execution, upon a judgment obtained by a bill-holder in an action against the executors of the drawer of the bill, obtained before the suit was instituted. The money, the proceeds of the execution, being in the hands of the sheriff at the instance of the creditor before the decree, the decree does not prejudice the rights of the plaintiff in the action (3). But if, after a decree, a judgment has been obtained by default against an executrix, which is set aside on the terms of the executrix pleading *plene administravit*, the Court will not, on the eve of the trial, do more than stay execution; and it will not allow the creditor to proceed against the executrix for the purpose of charging her personally (4).

3. A Court of Equity will not restrain the sheriff from executing a *fi. fa.* against furniture, &c., of the defendant at Law, which, with a house, &c., has been let by him to the plaintiff, who is in possession, unless a trust can be made out (5). But the Court will not allow personal property not absolutely the property of the judgment debtor, but subject to certain rights of another party, still subsisting in the property; to be seized by the sheriff under the execution (6).

4. If mortgaged personal property is in the possession of the mortgagee, he is not entitled to an injunction to restrain a subsequent execution against the mortgagor, since he has a perfect remedy at Law (7). An injunction will not be granted to restrain a party from selling, on an execution against a mortgagor, per-

(1) *Clarke v. Manning*, 7 Beav. 162.

(2) *Lee v. Park*, 1 Keen, 714, 724.

(3) *Marriage v. Skiggs*, 4 De G. & J. 4, 8.

(4) *Kirby v. Barton*, 8 Beav. 45.

(5) *Garstin v. Asplin*, 1 Madd. 150.

(6) *Beeston v. Marriott*, 4 Giff. 436,

9 Jur. (N. S.) 960.

(7) *Warner v. Paine*, 3 Barb. Ch. 630 (Amr.).

sonal property mortgaged to the complainant to secure an antecedent debt, where the execution was issued, although not actually levied, prior to the execution of the mortgage (1).

SECT. 3. *Mortgage of Chattels personal.*

1. If there has been a legal delivery of chattels by possession of them and confirmation of possession, under an agreement to assign them by way of mortgage; although no assignment has been executed, the Court will restrain assignees in bankruptcy from proceeding in an action for their recovery (2).

SECT. 4. *Shipping.*

1. If there is a strong suspicion of fraud in the party assured, the Court will, on the money being paid into Court, grant an injunction until the defendant, the plaintiff at Law, has put in an answer to the bill, to restrain him from proceeding further, notwithstanding verdicts have been given for him in other actions against some of the various underwriters, the whole of whom are plaintiffs in Equity (3).

2. Though a party may have had a prior equitable claim to shipping documents, if he does not properly insist on it, and thereby mislead another party who has a legal right to recover them from him, a Court of Equity will not stay an action by the party misled, against him to recover them (4).

3. Though vessels, which have been agreed to be assigned, have been seized in execution in an action for debt brought against the assignor, and an order for sale in default of payment has been obtained from a Common Law judge, whatever may have been the legal right of the assignor in the vessels before the execution, he would clearly have a right to relief in Equity (5).

(1) *Warner v. Paine*, 3 Barb. Ch. Price, 241.

630 (Amr.).

(4) *Hoare v. Dresser*, 7 H. L. C.

(2) *Piercy v. Humphreys*, *Piercy v.* 290; 5 Jur. (N. S.) 371.

Nowle, 15 L. T. (N. S.) 345.

(5) *Withall v. Tuckwell*, 5 Jur.

(3) *Kensington v. White*, 3 Price, (N. S.) 929.

164; *vide Whitmore v. Thornton*, 3

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4. If a suit is instituted to carry into effect an agreement, by giving the plaintiffs relief in respect of a breach of the agreement by the defendants, and at the same time, on the ground of such breach, to remove them from an office of trust and confidence—for instance, that of ship's husbands—which they hold by virtue of the agreement, and to appoint other persons to such office; the Court, if it consider the plaintiffs entitled to the relief sought, will, upon an interlocutory application, restrain the defendants from prosecuting actions at Law against the plaintiffs under the agreement, to recover damages for removing the defendants from such office (1).

(1) *Brenan v. Preston*, 10 Hare, 331.

CHAPTER III.

THE DOCTRINES AND PRINCIPLES IN RESTRAINING PROCEEDINGS
IN COURTS OF LAW AND OTHER COURTS, AS APPLICABLE TO THE
INCIDENTS OF PROPERTY (REAL AND PERSONAL).

 SECT. 1. *Account—Set-off.*

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1. The jurisdiction of the Courts of Law and Equity with respect to complicated accounts, is so far concurrent, that when parties have elected to proceed at Law, a Court of Equity will not stay such proceedings simply on the ground that it could more conveniently dispose of the suit; but a Court of Equity will not refuse its aid when invoked, because a Court of Law could completely settle the whole of the disputed accounts (1). A Court of Equity has jurisdiction to restrain actions involving complicated questions of account, when the accounts can be more conveniently taken in Equity. Accounts cannot be taken before an arbitrator at Common Law so conveniently as in a Court of Equity; and where there have been complicated transactions, and questions of difficulty are likely to arise in taking the accounts, a Court of Equity will grant an injunction to restrain proceedings at Law. If a plaintiff at Law give notice of an intention to move for a reference, it would seem that this alone is sufficient ground for a Court of Equity to assume jurisdiction over the matter and restrain the action, a reference at Common Law being necessarily a more imperfect method of taking accounts than that furnished by the practice in Equity (2).

2. If an account has been signed and settled by the plaintiff in Equity, leaving a balance in favour of the defendant in Equity, that is sufficient ground to refuse an injunction to restrain the

(1) *Scott v. Liverpool (Corporation),* 5 Jur. (N. S.) 105; *3 De G. & J.* 358. *American Shipping Co., Oakford v. Same,* 1 J. & H. 108; 8 Jur. (N. S.) 1190.

(2) *Croskey v. European and Ame-*

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defendant's proceedings at Law, though there have been subsequent dealings, if the plaintiff has refused to come to a settlement (1).

3. A Court of Equity will restrain an action in England to recover moneys, the right to which, as between the parties, depends on the result of a suit in a competent Court abroad, by the plaintiff against the defendant for an account, and will appoint a receiver pending that account (2).

4. After a decree for an account has been made, the Court will restrain the plaintiff from proceeding at Law in an action commenced by him pending the suit in Equity (3), it being a contempt to proceed at Law after the subject of the cause has been attached in Court (4).

5. It would seem that a bill will lie for an account by an author against his publisher, where the publisher refuses altogether to render any account; but if a publisher render an account, and bring an action for the balance due to him, in the absence of fraud or misstatement, the Court will not allow a suit by the author for an account to go on, but will leave the matter to be determined at Law. But there is no rule that an author may not file a bill for an account against his publisher; although in simple cases, which can be dealt with by a Court of Law, the Court will not assume jurisdiction or interfere with an action to recover a balance of account (5).

6. If accounts between a servant and agent and principal cannot be opened, and must be considered as settled, a Court of Equity will not restrain an action by the servant and agent for salary, because a question is raised by the principal of damages with a denial that salary is due, such questions are legal ones, and a bill for an account cannot be maintained (6). The bare relation of principal and agent does not entitle the principal to come into Equity for an account, if the matter can be fairly tried at Law (7).

Set-off.

7. A cross demand, purely legal, accrued after verdict, is no

(1) *Hirst v. Peirse*, 4 Price, 339.

C. 421; 8 L. J. (N. S.) Ex. Eq. 9.

(2) *Transatlantic Co. v. Pietroni*,
Joh. 604.

(5) *Barry v. Stevens*, 31 Beav. 258;
31 L. J. (Ch.) 785.

(3) *Wilson v. Weatherherd*, 2 Mer.
406.

(6) *Hunter v. Belcher*, 10 Jur.
(N. S.) 663.

(4) *Mocher v. Reed*, 1 B. & B. 318;
et vide Thorpe v. Mattingley, 2 Y. &

(7) *Barry v. Stevens*, 31 Beav.
258.

ground for an injunction to stay proceedings on the verdict. It is not reasonable that a cross demand acquired subsequent to a verdict, should delay the plaintiff at Law from the benefit of his verdict until the validity of the demand of the plaintiff in Equity—defendant at Law—is ascertained in a second trial, and in such a case Equity must follow the Law (1).

8. If a defendant has a personal demand against a plaintiff who has been decreed entitled to a charge of greater amount on the defendant's estate, and the defendant has got a judgment against the plaintiff, he will be restrained from issuing execution (2).

9. If a set-off is merely legal, no injunction to restrain proceedings at Law will be granted (3). As where a landlord proceeds at Law for rent, and the tenant claims to set off a legal demand against the distress. The policy of the law does not permit a set-off against a distress for rent; and a Court of Equity must follow the Law, and cannot relieve against the rule of law where the claim to set off is founded on a legal demand (4). If the subjects in dispute are matter of set-off and capable of proof at Law, and may be disposed of altogether at Law, a Court of Equity will not interfere (5). But if there is a cross claim against a plaintiff at Law in a case where there is no right of set-off in the action, a Court of Equity will restrain the proceedings at Law (6). A bill will not lie against a landlord to restrain proceedings upon a replevin bond on the ground of set off against the rent distrained for (7). So a private debt due from a trustee—for instance, costs due from him in an action of ejectment—cannot be set off against a debt—for instance, rent—owing to the trustee in his character of trustee, such a proposition is totally untenable (8).

(1) *Whyte v. O'Brien*, 1 S. & S. 551.

(2) *Austin v. Tynte*, 2 Moll. 486.

(3) *Townrow v. Benson*, 3 Madd. 203, 209.

(4) *Ib.*; *et vide Pratt v. Keith*, 33 L. J. (Ch.) 528.

(5) *Dinwiddie v. Bailey*, 6 Ves. 136.

(6) *Cawdor (Lord) v. Lewis*, 1 Y. & C. 427.

(7) *Pratt v. Keith*, 33 L. J. (Ch.) 528, 530.

(8) *Ib.* (See further as to the subject of set-off, note (3), p. 228, *ante*, on the "Supreme Court of Judicature Act, 1875," Order XIX., rule 3.)

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Partnership.

SECT. 2. *Partnership—Bankruptcy.*

1. A separate creditor of one partner has no right against the joint property of the partnership, farther than the separate interest of that partner; that is to say, his share upon a division of the surplus, subject to the accounts of the partnership (1). In analogy with this rule, if a creditor of a firm agree that he will not press his claims at maturity, if each partner will give his own indorsed note for half the amount; and one of the partners having complied with the condition, but the other not having done so, a suit is brought against the firm, the former partner is entitled to an injunction to restrain such suit until his note shall be delivered up to him (2).

Bankruptcy.

2. A Court of Equity will always restrain an action brought for a dividend, as contravening the bankrupt laws. Such actions have been maintained; but whatever may be the decisions of Courts of Law on the subject, it is the duty of the Great Seal not to permit them. The administration of the effects is vested in the Great Seal; and the creditor coming in to prove his debts submits to that authority. There may, indeed, be a case when an action may be permitted—for instance, if it were necessary to give the creditor the benefit of a personal remedy against an assignee who had wasted the effects; but then it must be under the control of the Court (3). If it is the intention of the parties to a deed of inspectorship to deal with each other as if the matter were in bankruptcy, a creditor who has proved for and received dividends on his whole debt secured by a policy, will not be allowed to sue the debtor for breach of covenant in not paying further premiums on the policy (4). If a creditor having a security, whether of no value or of value, make his election to prove for the whole debt, his security will be the property of the other creditors (5).

3. Equity will not restrain further proceedings at Law upon a verdict obtained through the defendant's neglect to produce his certificate in evidence (6).

(1) *Taylor v. Fields*, 4 Ves. 396.(4) *Kingsford v. Swinford*, 4 Drew.(2) *Childs v. Horr*, 1 Clark, 432 705.

(Amr.).

(5) *Ib.*(3) *Assignees of Gardiner v. Shan-non*, 2 Sch. & Lef. 229.(6) *Lingard v. Hibbertson*, 1 Rose, 459.

SECT. 3. *Interpleader.*PART III.
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1. In order to support an interpleader suit there must be conflicting claims (1). In a case of interpleader, though the claim of the principal defendant is legal, and the claims of the other defendant are derived from him, and equitable only, and do not extend to the whole amount recovered at Law, yet an injunction restraining legal proceedings may be obtained on an interpleader bill (2). The Interpleader Act, 1 & 2 Will. 4, c. 58, and the 1 & 2 Vict. c. 45, "An Act to extend the Jurisdiction of the Judges of the superior Courts of Common Law," apply only to those cases where the opposite claims of both parties depend on legal rights, and not on matters peculiarly of equitable jurisdiction, and in such cases as the latter, a Court of Equity will restrain proceedings in an issue at Law directed by a Judge of a Court of Common Law, under the order of interpleader (3). A Court of Equity will, on a bill of interpleader, restrain a suit in Equity by one defendant, and an action at Law by another (4).

2. If two parties claim a real estate under different wills, the validity of which are in controversy, the Court will restrain an action against the tenant by one of the claimants, upon a bill of interpleader by the tenant against both claimants, and bringing his rent into Court, and an issue will be directed to determine the rights of the defendants (5). If one of the defendants to a bill of interpleader insists that the effect of some act of the plaintiff is to deprive him, as against that defendant, of the right, which he would otherwise have, to treat the case as one of interpleader, a Court of Equity will not, on that account, refuse an injunction, unless it be satisfied either that the act relied on has the effect which the defendant attributes to it, or at least that the question, whether it has that effect or not, is a real and substantial question to be tried; and therefore, although it appears that the plaintiff has, by a memorandum in writing, acknowledged the title of one of the parties, and has paid rent to him for nearly two years after

(1) *Elliott v. Kempston*, 15 Ir. Ch. Rep. 120.

(2) *Hamilton v. Marks*, 5 De G. & Sm. 638.

(3) *Langton v. Horton*, 3 Beav. 464.

(4) *Crawford v. Fisher*, 10 Sim.

479.

(5) *Townley v. Deare*, 3 Beav. 213.

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the original landlord's death; yet, if such acknowledgment and payment appears to have been in ignorance of his title being disputed, the Court will restrain an action by that party for the recovery of rent (1). So although a stakeholder who has entered into a new contract, binding at Law, with one of the rival claimants of the same demand, cannot maintain an interpleader suit; yet if such contract was obtained by misrepresentation, the Court will restrain actions commenced against him by both claimants (2). A tenant cannot sustain a bill of interpleader against his landlord, unless the title is affected by some act done by the landlord subsequently to the lease (3). But if two parties claiming adversely an estate under the limitations of a settlement which contains a power of leasing, bring actions against a tenant for rent reserved under a lease made under the power, that is a proper case for an interpleader (4).

3. Although an attachment in the Lord Mayor's Court obtained by one party, may be inoperative while a judgment obtained by another party remains unsatisfied, yet the garnishees ought not to be put to expense in defending proceedings in which they have no interest, and they can therefore file a bill of interpleader (5). Laches in filing a bill of interpleader is a bar to the application (6).

4. It would appear that a bill of interpleader will not lie which is in the nature of, and substantially a bill for, a new trial, where the only point at issue is whether the plaintiff is a debtor at Law, and it has been decided at Law that he is (7).

5. Courts of Equity and Common Law have concurrent jurisdiction in interpleader; but a Court of Equity, if first resorted to, will not refuse to entertain a bill of interpleader, although a Court of Law might have been resorted to on the facts stated in the bill (8).

(1) *Jew v. Wood*, 1 Cr. & P. 185; 3 Beav. 579.

(2) *Costello v. Martin*, 1 Ir. R. Eq. 50.

(3) *Cook v. Rosslyn (Earl)*, 1 Giff. 167.

(4) *Birmingham v. Trick*, 7 Ir. R. Eq. 221.

(5) *Nelson v. Barter*, 10 Jur (N. S.) 832; 33 L. J. (Ch.) 705.

(6) *Larabrie v. Brown*, 1 De G. & J. 204; 26 L. J. (Ch.) 605.

(7) *Ib.*

(8) *Oriental Bank Corporation v. Nicholson, Same v. Calrow*, 3 Jur. (N. S.) 857.

6. Although it may be doubtful whether a case is properly one for interpleader—as for instance, where moneys might have been safely paid by the plaintiff—yet if the money is, however, paid into Court, and the suit may be said to have been adopted by all parties, it is then too late to take that objection (1). A party cannot file a bill of interpleader where one of the defendants has no title, and the title of another defendant claiming under him is subordinate to that of a third defendant (2).

7. The sheriff seizing goods under a *fi. fa.* issuing out of Chancery, is entitled to file in Equity a bill of interpleader where the goods or the produce thereof are claimed by a third party (3). But the sheriff cannot file such a bill until he has given notice to the judgment creditor of the adverse claims to the goods seized (4).

SECT. 4. *Discovery, Bill of, in aid of Action at Law—Actions, Proceedings at Law, Auditá querelâ, Verdicts, Judgments, Outlawry, Interdicts, Damages.*

1. If a plaintiff in Equity is entitled to a discovery in aid of his defence in an action at Law, he is entitled to an injunction to restrain the action until he has obtained the discovery (5). If a defendant fail in proving a material fact at Law, of which he afterwards obtains a discovery from the adverse party in Equity, it is a ground for granting an injunction, though he would not be permitted to prove the fact by any other witnesses whom he could have examined at Law (6).

Discovery, bill of, in aid of action at Law.

2. If an order has been made at Law by consent, staying an action and directing the payment of a certain sum of money by the defendant to the plaintiff, which sum the plaintiff afterwards accepts; yet a Court of Equity will set aside the order if the plaintiff was ignorant at the time of the order, and at the time he received the money, that a representation, which induced him

Actions, Proceedings at Law, Auditá querelâ, Verdicts, Judgments, Outlawry, Interdicts, Damages.

(1) *Myers v. United, &c., Guarantee Life Assurance Co.*, 7 De G. M. & G. 112.

806; 16 L. T. (N. S.) 49.

(2) *Desborough v. Harris*, 5 De G. M. & G. 439.

(4) *Dalton v. Furness*, 35 Beav. 461.

(3) *Child v. Mann*, L. R. 3 Eq.

(5) *Harris v. Collett*, 26 Beav. 222, 227.

(6) *Hankey v. Vernon*, 2 Cox, 12.

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to consent to the order, was fraudulent (1). The Court will restrain an action brought after a decree upon the subject matter of the suit, pending the proceedings in the suit (2). A Court of Equity will, if there are circumstances in the case which may create equities between the parties—as where it is a question whether the plaintiff and defendant do not stand in the relation of vendor and purchaser—stay process of outlawry and all further proceedings at Law against the plaintiff; the plaintiff in Equity to give judgment in the action, with stay of execution, to be dealt with as the Court should thereafter direct (3). A Court of Equity will restrain proceedings on the part of two joint debtors on an *audita querelâ* to be relieved at Law from a joint judgment, on the ground of a discharge from custody of one of them, if the discharge arose from a desire by the judgment creditor not to commit a breach of an injunction obtained by the debtors (4).

3. The Court will refuse to stay proceedings in an action, though the plaintiff seek a discovery as to documents for his defence at Law, if there is delay in applying for the injunction—as, for instance, more than a year after the action (5).

4. The Court will stay an action at Law for damages for an arrest under an irregular writ of *ne exeat regno*, issued from Chancery (6). If an irregularity has been committed by an officer of the Court in executing its process, the Court will not permit a party to proceed in an action at Law against its officer; and, if proper, will settle a compensation (7). If a party is arrested by virtue of the process of the Court of Chancery, which turns out to be irregular, he should apply to the Court, either for a reference to settle a proper compensation, or for liberty to bring an action (8).

5. There are cases in which Equity will relieve against verdicts ;

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| (1) <i>Dunn v. Cox</i> , 11 Hare, 61. | War. 86. |
| (2) <i>Frank v. Basnett</i> , 2 My. & K. 618. | (7) <i>Chalie v. Pickering</i> , 1 Keen, 749; <i>et vide</i> <i>Blundell v. Gladstone</i> , 9 Sim. 455; <i>Ambrose v. Dunmow Union</i> , 8 Beav. 43; <i>In re Weaver</i> , 2 My. & Cr. 441. |
| (3) <i>Drummond v. Pigou</i> , 2 My. & K. 168. | (8) <i>Bricknell v. Stamford</i> , 1 Beav. 368; <i>et vide</i> <i>Phillips v. Worth</i> , 2 Russ. & My. 638. |
| (4) <i>Clerke v. Moore</i> , 4 Bro. P. C. 723. | |
| (5) <i>South Eastern Railw. Co. v. Martin</i> , 1 H. & T. 69; 2 Ph. 758. | |
| (6) <i>Durley v. Nicholson</i> , 2 D. & | |

as where the plaintiff at Law knew the fact of his own knowledge to be otherwise than what the jury found, and the defendant at Law was ignorant of it at the trial; but where a defendant submits to try it at Law first, when he might, by a bill of discovery, have come at the fact before such trial was had, the Court will not always relieve against a verdict (1). An interdict obtained in one suit will be set aside in another on the ground that the judgment, or interdict, is *res inter alios actæ*, and binding only on the parties to the suit in which the interdict was obtained (2).

6. If land is laid out in town lots, or otherwise divided among many occupants, who are threatened with numerous suits, a bill in Equity lies to quiet the title, and enjoin a suit at Law for a particular fractional part, although the complainants have a legal title, and therefore an adequate remedy at Law in each particular case. The object of such bill is to relieve the title from the embarrassment of the adverse claims, and also to restrain a multiplicity of suits (3).

7. The smallness of damages recovered in an action will not prevent a Court of Equity from interfering (4).

SECT. 5. *Arbitration, Awards.*

1. A Court of Equity will, under circumstances, grant an injunction to restrain proceeding in an arbitration—as, for instance, where the bill strikes at the root of an agreement, of which an arbitration is a part execution (5). The Court of Chancery has no jurisdiction to set aside an award made under a reference of an action, whether the same is or is not under the 9 & 10 Will. 3, c. 15 (6). So, if an arbitrator, upon a reference of an action at Common Law to arbitration, makes a mistake in his award, the Court of Chancery has no jurisdiction to remedy the mistake;

(1) *Williams v. Lee*, 3 Atk. 224; 352; *vide Woodruff v. Fisher*, 17 *vide Anon.*, 3 Ch. Rep. 25. Barb. 224 (Amr.).

(2) *The Natal Land and Colonization Co. v. Good*, L. R. 2 P. C. 121; 16 W. R. 1086; 5 Moo. P. C. C. (N. S.) 132. (4) *Rochdale Canal Co. v. King*, 2 Sim. (N. S.) 78.

(5) *Mylne v. Dickinson*, Coop. 195.

(6) *Harding v. Wickham*, 2 J. & H. 676.

(3) *Crews v. Burcham*, 1 Black. 676.

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that can only be done in the Court of Law where the action was brought (1). If authority to make an award has been conferred upon commissioners by Act of Parliament, the Court has no jurisdiction, by way of appeal, to set it aside (2). A Court of Equity has no jurisdiction to alter an award made by an arbitrator appointed under the provisions of an Act of Parliament, unless there is error upon its face, or it is shewn to have been corruptly obtained (3). So if part of an award is *extra vires* and severable, the Court will reject that part and stay proceedings thereon, and uphold the rest of the award (4). The Court will admit evidence of an arbitrator in explanation of his award; and if it appear from such evidence that there has been a mistake on his part, either as to the subject matter referred to him, or in point of legal principle affecting the basis on which the award is made, the award will be set aside or referred back to the arbitrator (5). Delay and what amounts to acquiescence will preclude a party from contesting an award (6).

SECT. 6. *Gaming, Gambling, Wagering Transactions.*

1. Equity has jurisdiction to relieve against notes, bills, bonds, mortgages, and other securities or conveyances, given in respect of a gambling transaction, as by decreeing repayment of money paid under them (7), or restraining proceedings at Law, and ordering them to be delivered up to be cancelled (8). If the consideration for a judgment is a gambling transaction, the Court will restrain a sale under a *fi. fa.* on the judgment (9). If a defendant deny all knowledge of the gambling transaction out

(1) *Grafham v. Turnbull*, 44 L. J. (Ch.) 538; 23 W. R. 645.

(2) *Newry and Enniskillin Railw. Co. v. Ulster Railw. Co.*, 2 Jur. (N. S.) 60, 936.

(3) *Armitage v. Walker*, 2 K. & J. 211; 2 Jur. (N. S.) 13.

(4) *Ib.*

(5) *Dare Valley Railw. Co., In re*, L. R. 6 Eq. 429; 37 L. J. (Ch.) 719.

(6) *Parrott v. Shellard*, 16 W. R. 928.

(7) *Rawden v. Shadwell*, Amb. 269.

(8) *Newman v. Franco*, 2 Anstr. 519; *Andrews v. Berry*, 3 Anstr. 634; *Blackwell v. Redman*, 1 Ch. Rep. 48; *Humphrey v. Rigby*, 2 Freem. 223.

(9) *Cremorne (Lord) v. Bruen*, 2 Moll. 496.

of which bills of exchange are said to have originated, and swear that he gave valuable consideration for them, and the plaintiff produce no evidence in support of his case, the Court will not restrain proceedings at Law upon the bills (1).

2. Gambling debts contracted in this country are void, and cannot be recovered; but money won at play, or lent for the purpose of gambling, in a country where the games in question are not illegal, may be recovered in the Courts of this country; and therefore a Court of Equity will not restrain an action brought to recover the balance of an account, for which an I. O. U. has been given, though an unascertained portion of the balance is admitted to consist of money lent for the purpose of playing at public tables in a country where it does not appear that the games played at such tables were forbidden by the laws of that country (2).

(1) *Wynne v. Jackson*, 2 Russ. 351.

(2) *Quarrier v. Colston*, 1 Ph. 147.

CHAPTER IV.

THE DOCTRINES AND PRINCIPLES IN RESTRAINING PROCEEDINGS
IN COURTS OF LAW AND OTHER COURTS, AS APPLICABLE TO
PERSONS, AND RELATING TO PERSONS.

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SECT. 1. *Principal and Agent.*

1. If an agent is, *quâ* agent, obliged to indorse a bill, and the fact is known to indorsees, a Court of Equity will restrain proceedings thereon against the agent (1). The Court will not restrain a confidential agent from suing his employer upon a bond given by the latter, in respect of demands that arose during the continuance of the agency, but given after its termination; however, if a case were made of peculiar distress at the time of the bond given, the Court might interfere (2).

SECT. 2. *Creditor, Debtor and Creditor—Surety.*

Creditor,
Debtor and
creditor.

1. The principle upon which a Court of Equity restrains a creditor from enforcing his legal rights against the estate of a deceased debtor is, that the creditor is enabled to bring into Equity, with some specified exceptions, all his legal rights, and that the validity of his debt must be determined in Equity upon the same principle as at Law (3). But the Court will not restrain a creditor from prosecuting his legal remedy, against the personal representatives of his debtor, unless there is a decree under which the creditor has a present right to go in to prove his debt (4). And the Court will give the creditor all his costs at

(1) *Kidson v. Dilworth*, 5 Price, 564.

(3) *Whitaker v. Wright*, 2 Hare, 310.

(2) *Strathmore v. Fortune*, 1 L. J. (Ch.) 108.

(4) *Rankin v. Harwood*, 2 Ph. 22; 5 Hare, 215.

Law and the costs of the motion (1). However, the Court will not restrain a creditor of a testator who has obtained judgment against an executor *de bonis testatoris*, before a decree has been made in an administration suit, from issuing execution (2). Nor, after a decree to account, will a creditor be restrained from proceeding at Law upon a verdict obtained before the decree, which would entitle him to a judgment *de bonis propriis* against an executor (3). After a decree for administration in a creditor's suit, although the Court will restrain a creditor of the testator from proceeding at Law against the assets, yet it will not restrain him from proceeding against the executors personally (4). If they have so managed the matter by their plea at Law as to make themselves personally liable, and the creditor obtain a judgment *de bonis testatoris et si non de propriis*, a Court of Equity will leave them to be dealt with at Law, as the Court of Law will permit (5). But a Court of Equity will not suffer any judgment that may be recovered at Law, to interfere with its own decree (6).

2. The Court will not restrain a creditor from taking proceedings under a charging order *nisi*, upon a judgment obtained against the debtor, upon shares belonging to a deceased debtor, obtained prior to a decree for the administration of his estate, though on the same day (7).

3. If an heir plead a false plea at Law to an action by a bond creditor, the Court will, after an administration decree, restrain the creditor from taking out execution against the ancestor's assets, but not from proceeding against the heir personally (8). But if, after a decree for administration of assets, an executor plead a false plea to an action brought against him by a creditor of the testator, in order to have an opportunity of applying for an injunction to restrain the action, the Court will grant an injunction, and the creditor, in such a case, is not entitled to a

(1) *Turner v. Connor*, 15 Sim. 630. 383.

(2) *Roberts, In re, Fowler v. Roberts*,
2 Giff. 226.

(3) *Terrewest v. Featherby*, 2 Mer.
480.

(4) *Kent v. Pickering*, 5 Sim. 569.

(5) *Burles v. Popplewell*, 10 Sim.

(6) *Ib.*; *et vide Lee v. Park*, 1
Keen, 714.

(7) *Italy v. Barry*, L. R. 3 Ch. 452;
37 L. J. (Ch.) 723; 16 W. R. 654;
18 L. T. (N. S.) 491.

(8) *Price v. Evans*, 4 Sim. 514.

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judgment against the executor *de bonis propriis* (1). And if an administration decree has been pronounced, pending an action, the Court will restrain the creditor from proceeding at Law, upon payment of his costs at Law, although on a set-off and a *plene administravit præter* pleaded, the verdict was against the executor on all the pleas (2). If an administration decree has been obtained before action brought, by a creditor having no notice of the decree, although he will be restrained from proceeding at Law, yet all his costs will be ordered to be first paid (3). Although a creditor may have no notice of a decree for payment of debts, yet he will not be permitted to proceed at Law, and thus render the decree nugatory (4). If a creditor continue his proceedings at Law after notice of a decree for administration, he will be ordered to pay the costs of a motion to restrain him, but will be allowed to set them off against the costs of the proceedings at Law incurred prior to the notice (5). But after the common decree in a creditor's suit, the executor not denying that he has assets, nor disputing the debt, cannot obtain an injunction to restrain an action by a creditor of the estate against him, commenced before the suit, but not proceeded with since notice of the decree, except upon the terms of paying the costs at Law, and of the motion for the injunction (6). After a decree to account in an administration suit, the Court will restrain a creditor from proceeding in a suit instituted by himself, only when the executor has given an account of the assets and brought the amount into Court (7); for it would seem that a creditor whose suit in Equity is stayed, as well as a creditor who is restrained from prosecuting an action at Law, is entitled to have a discovery of assets possessed by the executor, and payment of the amount into Court (8). After a decree in a creditor's suit, the Court will stop a creditor from proceeding in another suit, for the recovery of a demand against the estate of a testator, if the object can be obtained in the first suit; but, *secus*, if the creditor would be unable to obtain

(1) *Fielden v. Fielden*, 1 S. & S. 255. 469; *et vide Pepper v. Foster*, 6 Ir.

(2) *Lord v. Wormleighton*, Jac. 148. Eq. Rep. 384.

(3) *Furlow v. Wilson*, 11 Price, 95. (6) *Cole v. Burgess*, Kay (App.), 1.

(4) *Brooks v. Reynolds*, Dick. 603; (7) *Hoops v. Kingston (Earl of)*,
1 Bro. C. C. 183. Fl. & K. 246.

(5) *Gardner v. Garrett*, 20 Beav. (8) *Macrae v. Smith*, 2 K. & J. 411.

relief in the first suit (1). But though a creditor has been restrained from proceeding at Law on account of a decree obtained, he will be allowed to prosecute a suit where proceedings on the decree have been delayed for some years (2). A creditor proceeding against an executor at Law, after notice of a decree to account, is so far committing a contempt, that upon application for an injunction, the Court will refuse him the costs of further proceedings at Law, and the costs of the application (3). After a decree for administration of a testator's estate, creditors will be restrained from suing at Law on the application of a legatee (4).

4. If a Court of Common Law has full jurisdiction to deal with the case, a Court of Equity will refuse an injunction—as, for instance, upon a bill by a shareholder in a company, to restrain proceedings at Law against him to recover from him individually a debt due from the company, without asking for other relief (5). If a creditor obtain judgment against a company without collusion or fraud, and proceed to enforce it by *scire facias* against a shareholder, a Court of Equity will not restrain the proceedings, or inquire into the validity of the judgment, but will leave the shareholder to raise his defence by pleading to the *scire facias* (6).

5. A Court of Equity will restrain a judgment creditor of a vendor, after suing out an *elegit*, from proceeding in ejectment against a purchaser who is in possession and files a bill for specific performance (7). So the Court will restrain a mortgagee from proceeding in an action against the mortgagor, to recover the mortgage money and interest, where the question is raised whether the defendant is mortgagee only, or whether the parties stood in the relation of vendor and purchaser (8).

6. If a garnishee order has been obtained by a judgment creditor against a receiver, and the receiver pays over to the judgment creditor moneys in his hands as such receiver, the

(1) *Costerton v. Costerton*, 2 Keen, 774; *et vide Pidgeon v. D'Alton*, J. & C. 276.

(2) *Powell v. Walworth*, 2 Madd. 183.

(3) *Curre v. Bowyer*, 3 Madd. 156.

(4) *Clarke v. Earl Ormonde*, Jac. 122.

(5) *Hardinge v. Webster*, 1 Dr. & Sm. 101; 6 Jur. (N. S.) 88.

(6) *Green v. Nixon*, 23 Beav. 530; 3 Jur. (N. S.) 993.

(7) *Bronton v. Neale*, 14 L. J. (N. S.) Ch. 8.

(8) *Drummond v. Pigou*, 2 Myl. & K. 168; 4 L. J. (N. S.) Ch. 27.

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judgment creditor will be ordered to repay the moneys (1). A judgment creditor who has notice of the possession of lands by a receiver, will not be allowed to continue proceedings by ejectment to recover the possession of them, unless they are taken with the leave of the Court (2). Parties to a suit, and all persons coming in under the decree, will be enjoined from disturbing a purchaser. And where there is original jurisdiction (as in carrying a trust into execution), if old judgment creditors will not come in, they will be restrained from proceeding against those lands in future (3).

Surety.

7. A promise by a bond creditor made to the principal debtor without consideration, and which does not bind the creditor at Law or in Equity, will not discharge a co-obligor who joined in the bond as surety only; and a Court of Equity will not restrain the bond creditor from proceeding at Law against the co-obligor, upon his liability as a surety (4). It is not every alteration of position that authorizes a surety to come to a Court of Equity and claim to be discharged from his liability. There may be many such alterations which do not vary the rights of the surety as against the principal debtor. The real test is, has the creditor in any way altered the position of the surety with reference to his remedies against the principal debtor? If not, then a Court of Equity does not interfere (5). But if a creditor give time to a debtor without notice to the surety, this will release the surety, and an injunction will be granted to restrain proceedings at Law against him (6). So if there has been an agreement to refer, and a reference between landlord and tenant, without the concurrence of the surety in a replevin bond, of matters in difference, whereby the performance of the condition of the bond (to proceed with effect) has been suspended, a Court of Equity will restrain the landlord from proceeding at Law against the sureties (7). So if by articles of partnership the partnership ought to be wound up

(1) *De Winton v. Brecon* (*Mayor of*), 28 Beav. 200; 6 Jur. (N. S.) 1046.

(2) *Lees v. Waring*, 1 Hog. 216.

(3) *Stackpoole v. Curtis*, 2 Moll. 504.

(4) *Tucker v. Laing*, 2 K. & J. 745.

(5) *Ib.*

(6) *Ireland (Bank of) v. Beresford*, 6 Dow. 233; *et vide Wright v. Sandars*, 3 Jur. (N. S.) 504.

(7) *Bowmaker v. Moore*, 3 Price, 214; 7 Price, 223.

at the expiration of the term limited by the articles, it is not competent to one of the partners, who has taken a bond from the other to indemnify him against loss in respect of the partnership, to agree to its continuance without the consent of the surety upon the bond, and yet to hold him liable as surety; and the bond creditor, therefore, will not be entitled to put the bond in force against the surety; by this continuation the surety is discharged, and whether that circumstance would afford a defence to an action on the bond or not, a Court of Equity will restrain the obligee from proceeding in such an action (1). So if a creditor having, among other things, a bond with a surety, take a mortgage from the principal debtor, and agree to receive the residue by instalments, secured by warrant, &c., without prejudice to any security he holds, an injunction will be granted against suing the surety (2). So if a creditor having recovered judgment against the principal and surety, levy his execution on property of the principal, and on payment of part of the execution direct the sheriff to restore the property, and give further time to pay the residue, without the assent of the surety, the judgment is thereby discharged as to the surety (3). But the rule of Law is always this, that you may suspend your rights for ever against the principal debtor, and yet preserve your rights against the surety; and that, even though you put into a deed words which in form are a release, a Court of Equity will not give that effect to them, but will take the whole of the deed together, and effectuate that which is the real intention of the parties (4). If the effect of a deed is to give a qualified release, and not to extinguish the debt, the remedy of the creditor against the surety is not barred (5). So if a deed only amount to a covenant not to sue the debtor, the surety will not be released (6). A transaction which would otherwise operate as a release of a surety will not have that effect if the remedy against the surety is reserved (7).

(1) *Small v. Currie*, 5 De G. M. & G. 17 W. R. 72, 385; L. R. 4 Ch. 204; 141; 18 Jur. 731; 23 L. J. (Ch.) 746. 38 L. J. (Ch.) 220; 20 L. T. (N. S.)

(2) *Boulton v. Stubbs*, 18 Ves. 20. 131.

(3) *Baird v. Rice*, 1 Call. 18 (Amr.); (5) *Ib.*
et vide Kennedy v. Evans, 31 Ill. 250 (6) *Ib.*
(Amr.). (7) *Wyke v. Rogers*, 1 De G. M. &

(4) *Green v. Wynn*, L. R. 7 Eq. 28; G. 108; 21 L. J. (Ch.) 611.

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8. A creditor who appropriates the subject matter of a security for a debt to any other purpose than the debt, by that act releases a surety, who became so with the knowledge that the debt was secured by that subject matter (1).

9. A surety, who has contracted to become so, on the understanding that he is to be co-surety with another, is wholly released in Equity if the intended co-surety does not execute (2). And a Court of Equity will restrain all proceedings at Law under a deed executed by the plaintiff as surety, but never by the other surety (3). If a creditor agree that he will, at any time when requested by the surety, enter up judgment and issue execution, and the creditor omit to file the warrant of attorney, and the debtor become bankrupt, the omission to do so will discharge the surety (4). But if the transactions which vary the position of the surety are known to the surety, he will not be discharged (5). Yet if the obligees in a bond, by their own conduct, prevent the performance of the object intended to be secured by the bond, the surety in the bond will be discharged, and the obligees restrained from proceeding at Law against him (6).

10. The Court will not restrain an action against a surety upon an interlocutory application, in a state of circumstances not shewing a sufficient probability that such a case would be proved, on further investigation, as would entitle the surety to be protected by a perpetual injunction at the hearing (7).

SECT. 3. *Husband and Wife—Guardian and Ward.*

Husband and wife.

1. A Court of Equity will restrain a wife from proceeding in the Divorce Court for a restitution of conjugal rights, until the hearing of the cause, if a deed of separation containing a covenant

(1) *Pearl v. Deacon*, 3 Jur. (N. S.) 879, 1187; 24 Beav. 186; 1 De G. & J. 461.

(2) *Evans v. Brembridge*, 8 De G. M. & G. 100; 2 K. & J. 174; 2 Jur. (N. S.) 134, 311; 25 L. J. (Ch.) 102, 334.

(3) *Ib.*

(4) *Watson v. Allcock*, 4 De G. M. & G. 242.

(5) *Woodcock v. Oxford and Worcester Railw. Co.*, 1 Drew. 521.

(6) *Blest v. Brown*, 4 De G. F. & J. 367; 3 Giff. 450.

(7) *Dawson v. Lawes*, 1 Kay, 280.

not to sue in that Court for that purpose, has not been impeached, but the wife will have liberty to file a cross bill to impeach the deed (1). A Court of Equity will, at the suit of a married woman, restrain the husband's assignee of a legacy given to her, from enforcing the legal remedies given by the will for the recovery of the legacy; such remedies do not deprive a legacy of its equitable character, so as to enable the husband to assign it free from his wife's equity to a settlement (2).

2. If a guardian, after his ward attains full age, continues to manage property at the request of the ward, and before the accounts of receipts and payments during the minority are settled, it is in effect a continuance of the guardianship as to the property, and the guardian must account on the same principle as though the transactions were during the minority; therefore he will be restrained from proceeding in an action to recover a balance claimed by him on account of the transactions after his ward had become adult (3). The Court will restrain parties claiming to be purchasers and indorsees of a note for value without notice of the circumstances on which the plaintiff relies as freeing her from liability in respect of her indorsement, from suing the plaintiff on the note, if the note has been drawn payable to the order of the plaintiff by a guardian, with whom the plaintiff then still resided, though two years and a half after she had come of age, and the indorsees knew of the guardianship (4).

Guardian and ward.

SECT. 4. *Attorney and Client.*

1. A solicitor will be restrained from enforcing the payment of an annuity at law granted to his wife by his client, under circumstances shewing that the client was under undue influence on the part of the solicitor (5); and where an instrument is obtained

(1) *Kitchen v. Kitchen*, 19 L. T. (N. S.) 674.

(3) *Mellish v. Mellish*, 1 S. & S. 138.

(4) *Maitland v. Buckhouse*, 16 Sim.

(2) *Duncombe v. Greenacre*, 29

58.

Beav. 578; 2 De G. F. & J. 509; 6 Jur. (N. S.) 987; 8 W. R. 657.

(5) *Goddard v. Carlisle*, 9 Price, 169.

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either as a gift or purchase, in fraud of the fiduciary situation of the donee or purchaser, a Court of Equity will not impose the terms of paying the money into Court, if the relationship be that of attorney and client (1).

SECT. 5. *Officers of the Court, Sheriff, Receiver, Auctioneer (under sanction of the Court).*

1. The Court of Chancery exercises a discretion in permitting actions to proceed, but it will never permit its decisions to be questioned in a Court of Law; therefore if an action of trover is brought against a sheriff for an ejectment under a writ of assistance, issued in pursuance of an order of the Court of Chancery, an injunction will be granted to restrain further proceedings in such action, although the action also seeks damages for a trespass by the sheriff in taking chattels not included in the order (2). Where there is no good reason to suppose that a receiver has acted maliciously or *malâ fide*, or that any substantial damage has been sustained, the Court will restrain an action of trespass against him (3). If, from the circumstances, it appears impossible to make out a case for damages for an irregularity committed by the messenger of the Court, the Court will restrain a party from proceeding in an action of trespass brought against the messenger (4). The Court will restrain an action by an auctioneer against the solicitor in a lunacy for the amount of his bill for selling property belonging to the lunatic, if the sale is made by him under the authority and sanction of the Court, and a reference will be directed for the purpose of ascertaining what would be a proper sum to be allowed him (5). A claim arising in the course of an employment under a lunacy, and for the purpose of carrying into effect the directions of the Court in the lunacy, unless there is some special agreement to the contrary, would be properly the subject of inquiry before the Court

(1) *Goddard v. Carlisle*, 9 Price, 169.

(2) *Walker v. Micklethwait*, 1 Dr. & Sm. 49.

(3) *Parr v. Bell*, 9 Ir. Eq. Rep. 55.

(4) *Chalie v. Pickering*, 1 Keen, 749.

(5) *In re Weaver*, 2 My. & Cr. 441, 442.

at Chambers (1). Where process has been set aside for irregularity, the officer or party desiring the protection of the Court for acts performed under such process must apply promptly (2).

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SECT. 6. *Lunacy.*

1. The Court of Chancery will take judicial notice, in a suit to obtain payment out of a lunatic's assets after his death, that an action against the lunatic for the recovery of a debt due for necessities, would have been restrained by the Lord Chancellor in lunacy, and therefore a lapse of six years during the lunatic's life will not bar a debt of this description (3).

SECT. 7. *Executor, Administrator.*

1. The Court will not permit an executor, after the testator's estate has been fully administered in the Court, without leave, to prosecute an action against a party to the suit for recovery of part of the testator's estate (4). Nor will it do so pending a suit to administer the estate (5). An administrator will be restrained from prosecuting an action to recover a debt, where there is evidence that the intestate had created a trust of the fund due by the debtor, which the debtor had accepted (6). If a testator, by will, gives or forgives a debt, it is a testamentary act, and will not be good against creditors; but against an executor it may be so; and if an action should be brought for it, the Court will grant an injunction (7).

2. An executor will be relieved against a verdict after pleading *ne unques* executor, if some slight thing only was at the trial proved to have come to his hands (8)

(1) *In re Weaver*, 2 My. & Cr. 441, 442.

(2) *Mackay v. Bluckett*, 9 Paige, 437 (Amr.).

(3) *Stedman v. Hart*, 1 Kay, 607.

(4) *Oldfield v. Cobbett*, 5 Beav. 132; 6 Beav. 515.

(5) *Milner v. Goolden*, 1 Cox, 196.

(6) *M'Fadden v. Jenkyns*, 1 Hare, 458; 1 Ph. 153.

(7) *Sibthorp v. Moxom*, 3 Atk. 581; S. C. *sub nom.* *Sibthorp v. Moxton*, 1 Ves. Sen. 49.

(8) *Cryer v. Goodhand* and an anonymous case, both cited in *Robinson v. Bell*, 2 Vern. 147.

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3. An executor who has obtained probate will not be restrained, at the instance of the next of kin, from suing for and collecting the debts due to the deceased, though the will may have been impugned in the Court for proving wills, in a suit to recall probate (1).

4. If an executor gives bills or incurs liabilities in respect of his testator's estate, the Court will not, in a suit instituted for the administration of the estate, restrain an action against the executor in respect of such bills or liabilities; such relief, if to be obtained, must be sought in a distinct suit (2)

5. If an administrator, who had failed to plead because advised that his plea would not avail, afterwards discover facts which would have made his plea good, he is entitled to relief against judgment on default, as he was obliged, from the nature of his office, to rely upon information (3)

6. If Equity has taken jurisdiction over the estate of a deceased person for the purpose of settlement, it will restrain an action against the administrator on his bond for an alleged breach of duty (4). If the action was commenced before the decree, the order will be to stay its further prosecution; but if the action commenced afterwards, it may be dismissed (5)

SECT. 8. *Heir expectant, Heir-at-Law.*

1. A Court of Equity will not restrain a tradesman from suing on securities for the price of goods sold to an expectant heir, with the knowledge that the purchaser intended to sell them for the purpose of raising money, if the prices for the goods are fair and reasonable, and the transaction known to the party in possession of property, the reversionary interest in which was mortgaged at the same time by the expectant heir, though then under pecuniary pressure, and where the party in possession stood *in loco parentis*

(1) *Mullen v. Horner*, Hay. & J. 398.

(2) *Lucas v. Williams*, 4 De G. F. & J. 436; 10 W. R. 578, 606; 8 Jur. (N. S.) 207.

(3) *Hewlett v. Hewlett*, 4 Edw. Ch. 7 (Amr.).

(4) *Washington v. Emery*, 4 Jones, Eq. 32 (Amr.).

(5) *Id.*

to the heir, and the heir has subsequently allowed the consideration given for the securities to be so dealt with that it could never be restored to the other party in its original condition, and has not been able to shew a continuance of the pressure compelling him to act as he did (1). If, pending a suit for the establishment of a will of real estate, the heir-at-law, who has concurred in the will and in the establishment of the suit, commence actions of ejectment and detinue to recover the estate and title-deeds, the Court will consider what proceedings ought to be taken to defend the actions, and restrain them in the meantime (2).

SECT. 9. *Indictments.*

1. If the agents of the receiver in a cause, acting under leave of the Court, have taken forcible possession of a house occupied by a servant of one of the defendants, the Court will restrain that defendant from prosecuting an indictment against the agents (3).

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|---|---|
| (1) <i>King v. Hamlet</i> , 3 Cl. & F. 218; | (2) <i>Edgecumbe v. Carpenter</i> , 1 Beav. |
| 9 Bli. (N. S.) 575; 2 My. & K. 456; | 171; 8 L. J. (N. S.) Ch. 17. |
| Coop. t. Brough. 281; 4 Sim. 223. | (3) <i>Turner v. Turner</i> , 15 Jur. 218. |

CHAPTER V.

THE DOCTRINES AND PRINCIPLES IN RESTRAINING PROCEEDINGS
IN COURTS OF LAW AND OTHER COURTS, AS APPLICABLE TO
CORPORATIONS, QUASI CORPORATIONS, AND COMPANIES.

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SECT. 1. *Corporations—Quasi Corporations.*

Corporations.

1. If there is a very important and substantial question for discussion at the hearing, the Court will restrain a judgment creditor of a corporation and sheriff from levying writs of *fi. fa.* and *elegit*, and from levying execution against the property real and personal of the corporation (1).

Quasi corporations.

2. There is no jurisdiction in a Court of Equity to restrain an action against a barrister by the obligees of a bond given by him to the treasurers of his Inn to secure the payment of dues until he ceased to be a member of the Inn; nor to compel the Society of the Inn to permit him to retire therefrom without giving an undertaking not to practise, or without being subject to the payment of any fine or composition on retiring; the jurisdiction in questions of that kind is in the Inn, subject to an appeal to the Judges of the Superior Courts (2).

SECT. 2. *Companies.*

1. If a company has been amalgamated with, and has handed over its assets to another company, and the united company is insolvent, a shareholder creditor of the first company will not, upon a bill asking no other relief, be restrained from enforcing a judgment against a

(1) *Att.-Gen. v. Wilkinson*, 5 Jur. (N. S.) 538; 28 L. J. (N. S.) Ch. 392; 127; 43 L. J. (Ch.) 409; 22 W. R. 400; 7 W. R. 301; 32 L. T. 386; 29 L. J. 30 L. T. (N. S.) 290.
(Ch.) 41.
(2) *Neate v. Denman*, L. R. 18 Eq.

party shareholder in the first company and in the amalgamated company. A Court of Common Law has full jurisdiction to deal with such a case (1).

2. The shareholders in a public company cannot, in the absence of collusion and concert, question, as against a creditor in Equity, who has obtained judgment by default against the company, the validity of the original debt, or discuss whether the action could have been successfully resisted by the company (2). But if the creditor proceed to enforce his judgment against several shareholders, he is bound to give credit to one shareholder whom he sues, for moneys previously received from the others. But the Court will not disturb the appropriation of part of the moneys the creditor has received in payment of his costs of ineffectual proceedings against other shareholders (3). If the Court infers from the evidence that it is an object of an action against a company to prevent the prosecution of a suit against that company, it will restrain the plaintiffs in the action, until the hearing of the cause, from prosecuting their right under a *sci. fa.* obtained by them against the plaintiffs in the suit, or any other person on whose behalf the bill was filed (4). Such a course of proceeding on the part of the plaintiffs in the action, if permitted, would interfere with one of the main questions in the original suit, and if it be shewn to have been adopted in collusion with, or for the purposes of, the original defendants in the original suit, the Court will interfere. It will not allow a person claiming to be a creditor to proceed on behalf of one of the parties litigant in a suit to determine as between them, by hostile proceedings *dehors* the suit, those rights which are the subject of the original litigation; and if he be put in motion by either of the litigant parties, he is treated as one of them, his claim as a creditor is disregarded, he is considered as one of the parties to the suit, and is only entitled to such relief as the whole effect of the suit will give him (5).

3. The Court will not restrain one of the promoters of an

(1) *Hardinge v. Webster*, 1 Dr. & Sm. 101; 6 Jur. (N. S.) 88.

(2) *Green v. Nixon*, 23 Beav. 530; 3 Jur. (N. S.) 993.

(3) *Ib.*

(4) *Horn v. The Kilkenny and Great Southern and Western Railw. Co.*, 1 K. & J. 399.

(5) *Ib.*; *Taylor v. Hughes*, 2 J. & L. 24.

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abortive company from bringing an action for money advanced by him to the other promoters for the purposes of the proposed company. The promoters of a joint-stock company are not partners, for as such they would all be liable to the expenses of carrying on the joint stock business or object, although each of them had not personally concurred in incurring them; but this is not the case with promoters of a company if the company fails to be formed, each promoter is only liable for that portion of the expenses which he himself, either actually or impliedly by Law, must be held to have sanctioned (1).

4. If debentures of a company have been issued fraudulently as between the directors of such company and the person to whom they were issued; a third party, to whom such debentures have been assigned for value, and without notice of the circumstances under which they had been issued, is in no better position than the person to whom they were issued, and must, as an assignee of a chose in action—which can only be put in suit in the name of the original holder, and the assignee of which cannot in general stand in any better position than the original holder—take subject to all the equities which affected such person, unless there have been such dealings between the assignee and the company as might render the latter liable to the assignee, though it would not have been liable to the assignor (2). If debentures are clearly not issued so as to bind the society, an assignee thereof, although a *bonâ fide* purchaser for value, without notice of any infirmity affecting such debentures, is not entitled to recover for them as against the great body of the shareholders, and will be restrained from suing the company at Law upon them. Persons dealing in the market for the debentures of a joint stock company are bound to use reasonable precautions in seeing to the authenticity of the documents which they are purchasing (3).

(1) *Hamilton v. Smith*, 5 Jur. (N. S.) 32.

(2) *Athenæum Life Insurance Society v. Pooley*, 3 De G. & J. 294; 5 Jur. (N. S.) 129; 4 Jur. (N. S.) 371.

(3) *Ib.* By "The Supreme Court of Judicature Act, 1873," s. 25 (6), it is enacted that an absolute assignment of

a legal chose in action, with notice in writing to the debtor, &c., shall be effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if that Act had not passed) to transfer the legal right to the chose in action from the date of such notice.

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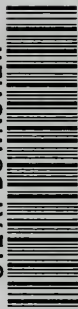
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